

Version 1.0 Rationale

Proposed Hawaii Administrative Rules
Title 11 Department of Health
Chapter 200.1 Environmental Impact Statement Rules

March 2018

Prepared with the assistance of the Office of Environmental Quality Control (OEQC).

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I. Introduction

A. Historical Background on the Rules

The current Hawaii Administrative Rules (HAR) Title 11, Chapter 200 rules were promulgated and compiled in 1996 (the “1996 Rules”). An amendment to add an exemption class for the acquisition of land for affordable housing was added in 2007, although it has not been compiled with the rest of the rules.

B. Historical Background on the Rules Update (2012-2014)

In 2011, the public formally petitioned the Environmental Council (the “Council”) to update chapter 11-200, HAR. The Council initiated consultation with state and county agencies for recommendations on issues to address and language revisions. In 2012, the Council released a preliminary draft of revisions to chapter 11-200, HAR (referred to as “Version 1”) that incorporated proposed revisions from previous Council efforts and issues raised by agencies and the public. The Council also distributed an Excel file called a “comment matrix” to receive feedback on Version 1. Agencies and the public (including individuals, applicants, consultants, and nonprofit organizations) submitted comments via the comment matrix. The Council organized the feedback into a master comment matrix and tasked the Rules Committee with addressing the feedback and revising the rules language. The Rules Committee met regularly over the course of 2012-2014 to revise Version 1. However, due to various administrative challenges, including maintaining quorum, the Council was not able to complete its work.

C. Current Efforts (2016-present)

In February 2016, following Governor Ige’s appointment of seven members to the Council, the Council resumed moving forward on revisions to chapter 11-200, HAR. As part of this effort, the Council wanted to recognize the extensive outreach and drafting that the 2012 Council conducted. Multiple discussion drafts, as described below, were made available to agencies, interested stakeholders, and the general public throughout the pre-consultation period and comments were sought at every stage of the process.

i. Drafting Process; Public Input Process, Pre- and Post- Permitted Interaction Group

At the February 23, 2016 Council meeting, the Council established a Permitted Interaction Group (PIG) to draft revisions to chapter 11-200, HAR. The PIG was tasked with investigating and considering specific language for inclusion in the revisions to chapter 11-200, HAR. The PIG’s work was not for decision-making and was limited to work that would be proposed to the Rules Committee for its consideration and decision-making to make recommendations to the Council.

Permitted Interaction Group Principles

The PIG drafted language within the following principles established by the Council:

- Be consistent with the intent and language of chapter 343, Hawaii Revised Statutes (HRS).
- Align statutes, case law, and practice wherever feasible.
- Increase clarity of the process and legal requirements.
- Align with the National Environmental Policy Act (NEPA) where applicable.

Permitted Interaction Group Process

Following the Council's establishment of the PIG, the PIG met monthly or biweekly to review the previous Council's work. The PIG reviewed the 2012 draft rules language, the 2012 comment matrix produced by the prior Rules Committee, and the responses to the public comments that the Rules Committee developed over 2012-2014. The PIG categorized the comment matrix into two groups: (1) comments resolved and direction provided/draft language, and (2) outstanding comments still needing policy direction or draft language. For the former group, the PIG integrated the resolved language into a draft called Version 1.1.

For the second group, the PIG developed language in consultation with the Rules Committee and the Office of Environmental Quality Control (OEQC). Further, the PIG developed language in response to requests from the Rules Committee and OEQC for issues that arose since 2012. At the July 11, 2017 meeting, the Council agreed that the PIG could present its report directly to the Council at its meeting on July 27, 2017.

ii. Version 0.1

On July 27, 2017, the PIG presented its report and submitted Version 0.1 of the draft revisions to the 1996 Rules to the Council for its consideration in rulemaking to update the 1996 Rules. (Refer to Version 0.1 for additional background information.) The Council approved Version 0.1 at its meeting on August 8, 2017 as the baseline document for further edits and to serve as a foundation for early consulting with affected agencies, interested stakeholders, and the general public. The Council's approval of Version 0.1 concluded the work of the PIG.

The PIG recommended the following revisions to the Council as a baseline starting point for discussion going forward. Among the themes addressed were:

- "Housekeeping" - revisions that modernize grammar and clarify language.
- Clarifying roles and responsibilities at various stages of environmental review.
- Modernizing submittals and deadlines to recognize electronic communication.
- Setting clearer thresholds for exemptions and the role of exemption lists.
- Clarifying when and how to proceed directly to preparing an environmental impact statement (EIS) instead of an environmental assessment (EA).
- Clarifying when and how to do programmatic EISs and supplemental EISs.
- Responding to comments in EAs and EISs.
- Conducting joint federal-state environmental review.

In August 2017, OEQC and the Council began working with a drafting team from the William S. Richardson School of Law to continue drafting language for the revisions to the 1996 Rules. OEQC also set up an online comment platform using CiviComment, allowing for an additional means of commenting on the rules update, as well as a webpage on the OEQC website tracking the rules update schedule, Council meetings on the rules update, and comment deadlines. See <http://health.hawaii.gov/oeqc/rules-update/>. Those who signed up with OEQC were sent notifications via email regarding changes to the rules update schedule and comment deadlines posted to the rules update webpage.

iii. Version 0.2

Version 0.2 was introduced to the Council on September 5, 2017 as a discussion document that incorporated public and agency comments, as well as comments received from Council members. The Council closed comments on Version 0.2 on October 20, 2017.

Version 0.2 proposed changes affecting almost every section of the 1996 Rules. In addition to the numerous “housekeeping” revisions, the following major topics were addressed in Version 0.2:

- Clarifying definitions and aligning them with statutory definitions.
- Explicitly incorporating cultural practices in accordance with Act 50 (2000).
- Updating requirements and procedures to publish in the OEQC periodic bulletin (i.e., *The Environmental Notice*).
- Aligning the “triggers” requiring environmental review for agencies and applicants with statutory language.
- Clarifying the environmental review process emergencies and emergency actions.
- Clarifying roles and responsibilities of proposing agencies and approving agencies.
- Revising the requirements and procedures for creating exemption lists and exempting actions from further environmental review.
- Modernizing submittals, deadlines, comment and response, and distribution to recognize electronic communication.
- Revising the comment and response requirements and procedures for EAs and EISs.
- Clarifying style standards for EAs and EISs, including when an action is a program or a project.
- Clarifying significance criteria thresholds for determining whether to issue an exemption notice, Finding of No Significant Impact (FONSI), or EIS Preparation Notice (EISPN).
- Clarifying requirements and procedures for directly preparing an EIS instead of an EA.
- Revising requirements for conducting scoping meetings following an EISPN.
- Clarifying content requirements for draft and final EISs.
- Revising procedures for appealing non-acceptance to the Council.
- Revising procedures for joint federal-state environmental review.
- Revising the requirements and procedures for determining when to do a Supplemental EIS, including aligning the requirements with statute and case law.
- Adding a retroactivity section for actions that have already completed environmental review or are undergoing review at the time the Proposed Rules (as defined below) would be promulgated.

iv. Version 0.3

Version 0.3 made multiple changes to Version 0.2 based on agency and public comments and Council input. Most notably, Version 0.3 reorganized, added, and deleted sections of the 1996 Rules to create Chapter 11-200A, HAR. The purpose of the reorganization was to ensure that the structure of the rules more closely followed the sequence of steps in the environmental review process.

Because Version 0.3 reorganized the subchapters and sections, confusion could arise when referencing subchapters and sections. To ease discussion of differences between the 1996 Rules and changes proposed in Version 0.3, Version 0.3 called the proposed rules “HAR Chapter 11-200A” and appended an “A” to the end of each subchapter and section number. A reference to a section number without using “A” was understood to be a reference to the 1996 Rules.

For example, section 3 in the 1996 Rules applies to the periodic bulletin, whereas section 3A in Version 0.3 was about the computation of time. What was section 3 in the 1996 Rules had been moved to subchapter 4A Filing and Publication in the Periodic Bulletin and the content that was in section 3 was divided into three sections: 4A, 5A, and 6A.

Version 0.3 did not carry forward all proposed additions and deletions considered in Versions 0.1 and 0.2. Rather, Version 0.3 only showed changes with respect to the existing 1996 Rules and 2007 amendment for consideration in that working draft.

Version 0.3 reorganized the 1996 Rules almost entirely and proposed changes affecting almost every section of the 1996 Rules. In addition to the reorganization and numerous “housekeeping” revisions, the following major topics were addressed in Version 0.3:

- Clarifying definitions and aligning them with statutory definitions.
- Incorporating cultural practices in accordance with Act 50 (2000).
- Updating requirements and procedures to publish in the OEQC periodic bulletin (i.e., *The Environmental Notice*), including for unusual situations involving publishing again.
- Aligning the “triggers” requiring environmental review for agencies and applicants with statutory language.
- Clarifying the environmental review process as it applies to states of emergency and emergency actions.
- Clarifying roles and responsibilities of proposing agencies and approving agencies in the environmental review process.
- Revising the requirements and procedures for creating exemption lists and exempting actions from further environmental review.
- Modernizing submittals, deadlines, comment and response, and distribution to recognize electronic communication.
- Revising the comment and response requirements and procedures for EAs and EISs.
- Clarifying style standards for EAs and EISs, including when an action is a program or a project.

- Clarifying significance criteria thresholds for determining whether to issue an exemption notice, FONSI, or EISPN.
- Clarifying requirements and procedures for directly preparing an EIS instead of an EA.
- Revising requirements for conducting scoping meetings following an EISPN.
- Clarifying content requirements for draft and final EISs.
- Revising comment and response requirements.
- Clarifying acceptance criteria.
- Clarifying procedures for appealing non-acceptance to the Council.
- Revising procedures for joint federal-state environmental review.
- Consolidating into one section the requirements and procedures for determining when to do a Supplemental EIS, including aligning the requirements with statute and case law.
- Adding a retroactivity section for actions that have already completed environmental review or are undergoing review at the time the rules would be enacted.

v. Version 0.4

Version 0.4 was released to the public and the Council on February 20, 2018 for discussion at the Council's February 20, 2018 meeting. Version 0.4 made multiple changes to Version 0.3 based on agency and public comments and Council input. Most notably, Version 0.4 introduced the following new topics:

- Providing a new process, referred to as the "green sheet" for agencies to examine: (1) whether a proposed activity is covered by an existing environmental review document; (2) the level of review necessary for a proposed action, and (3) whether a proposed action requires additional review.
- Exemptions - requiring agency exemption lists to be categorized into two parts: (1) allowing for agencies to designate certain activities as *de minimis* and therefore not requiring exemption documentation; and (2) those activities requiring exemption documentation and publication in the periodic bulletin.
- Explicitly requiring consideration of the impacts of sea level rise and greenhouse gases as significance criteria.
- Requiring submission to OEQC of an audio recording of oral comments received at the public scoping meeting(s) on an EIS.

For its March 6, 2018 meeting, the Council made typographic and other minor corrections and introduced as Version 0.4a. The Council considered Version 0.4a for decision-making at its March 6, 2018 meeting and voted 13-0-0 (with two excused) to approve Version 0.4a, as amended (hereinafter, the "Proposed Rules"). At this meeting, the Council also voted to approve the Public Notice of Rulemaking, this Rules Rationale, and the Changes from the 1996 Rules documents (the Proposed Rules, Public Notice of Rulemaking, Rules Rationale, and the Changes from the 1996 Rules documents are collectively referred to as the "Rules Package") and voted to recommend that Governor Ige approve the Proposed Rules for formal public hearing and to send the Rules Package to the Small Business Regulatory Review Board (SBRRB) for review. On March 21, 2018, the SBRRB reviewed the Rules Package and voted to recommend that Governor Ige proceed with public hearings for the Proposed Rules.

D. Process Moving Forward

OEQC and the Council will take comments on the Proposed Rules during the 30-day comment period. During the 30-day comment period, the OEQC will hold public hearings on the Proposed Rules in each county.

In addition to the public hearings, the OEQC will post the draft language on CiviComment for use during the 30-day public comment period.

At the close of the 30-day comment period, the Rules Committee will review all comments and revise the Proposed Rules, as needed. All revisions to the Proposed Rules will be presented to the Council for decision-making. If the Council approves the revisions and no substantive changes are made, the Council will request that the Governor approve the final rules as chapter 11-200.1, HAR. (If substantive changes are made, additional public hearings may be required on the Proposed Rules.)

Refer to the OEQC rules update webpage for more information on the process moving forward:
<http://health.hawaii.gov/oeqc/rules-update/>.

II. Global Discussion Points

A. Reorganization

The overall reorganization of the 1996 Rules is proposed to make the rules clearer and to reflect the sequence of going through environmental review.

The 1996 Rules repeat or cross-reference many steps in the process. For example, the 1996 Rules have Section 3 on publishing in *The Environmental Notice*, but has additional publication requirements in the following sections: 9, 15, and 20. The Proposed Rules consolidate directions on how to publish into one section.

The order of the sections in the 1996 Rules do not reflect the order of going through the environmental review process. For example, the significance criteria are found in Section 12, following the draft EA section, yet the significance criteria are part of the initial decision to prepare an exemption, EA, or EIS. The Proposed Rules move the significance criteria to earlier in the order prior to deciding the appropriate level of review.

Similarly, the 1996 Rules group the EA and EIS steps by content and then process. For example, the 1996 Rules organize the EIS sections in the following order: consultation prior to a draft EIS, general content requirements for EISs, content for a draft EIS, then content for a final EIS, followed by style, filing, distribution, review, and acceptability. The Proposed Rules reorganize these sections into the flow of the process: consultation prior to preparing a draft EIS, content requirements for a draft EIS, public review of a draft EIS, comment responses for a draft EIS, content requirements for a final EIS, and the acceptability of a final EIS. The Proposed Rules consolidate filing and distribution requirements into the subchapter on filing and publishing in the periodic bulletin.

While versions 0.1 and 0.2 retained the 1996 Rules sequence of sections but added some new sections, Version 0.3 introduced a complete reorganization of the sections. To make discussion of the rules in Version 0.3 easier, the organized rules were referred to as Chapter 11-200A and had “A” appended to the end of each section number.

For Version 0.4, the Proposed Rules are referred to as “Chapter 11-200.1” because the 1996 Rules would be repealed and in their place Chapter 11-200.1 would be promulgated. Note the sequence of sections were modified from the order in Version 0.3.

The following table shows where sections from the 1996 Rules appear in the Proposed Rules for Version 0.4. In general, almost every section includes new and moved 1996 language. The 1996 Rules sections cited below are the primary sources for the corresponding Proposed Rules sections. “New” indicates that the section is almost entirely new or incorporates important points from a 1996 Rules section.

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Version 0.4 Chapter 11-200.1, HAR	1996 Section
Subchapter 1 Purpose	
§11-200.1-1 Purpose	1, 14, 19
Subchapter 2 Definitions	
§11-200.1-2 Definitions	2
Subchapter 3 Computation of Time	
§11-200.1-3 Computation of Time	New
Subchapter 4 Filing and Publication in the Periodic Bulletin	
§11-200.1-4 Periodic Bulletin	3, 11.2, 21, 27
§11-200.1-5 Filing Requirements for Publication and Withdrawal	3, 9, 10, 11.1, 11.2, 20, 23
§11-200.1-6 Republication of Notices, Documents, and Determinations	New
Subchapter 5 Responsibilities	
§11-200.1-7 Identification of Approving Agency and Accepting Authority	3, 4, 23
Subchapter 6 Applicability	
§11-200.1-8 Applicability of Chapter 343, HRS to Agency Actions	New, 5, 8
§11-200.1-9 Applicability of Chapter 343, HRS to Applicant Actions	New, 5, 6
§11-200.1-10 Multiple or Phased Actions	7
§11-200.1-11 Use of Prior Exemptions, Findings of No Significant Impact, or Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS for Proposed Activities	New
Subchapter 7 Determination of Significance	
§11-200.1-12 Consideration of Previous Determinations and Accepted Statements	13
§11-200.1-13 Significance Criteria	12
§11-200.1-14 Determination of Level of Environmental Review	New, 5, 8
Subchapter 8 Exempt Actions, List, and Notice Requirements	
§11-200.1-15 General Types of Actions Eligible for Exemption	8

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Version 0.4 Chapter 11-200.1, HAR	1996 Section
§11-200.1-16 Exemption Lists	8
§11-200.1-17 Exemption Notices	8
Subchapter 9 Preparation of Environmental Assessments	
§11-200.1-18 Preparation and Contents of a Draft Environmental Assessment	9, 10, 19
§11-200.1-19 Notice of Determination for Draft Environmental Assessments	11.1
§11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments	9.1
§11-200.1-21 Contents of a Final Environmental Assessment	10
§11-200.1-22 Notice of Determination for Final Environmental Assessments	9, 11.2
Subchapter 10 Preparation of Environmental Impact Statements	
§11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement	9, 15
§11-200.1-24 Content Requirements; Draft Environmental Impact Statement	16, 17, 19, 22
§11-200.1-25 Public Review Requirements for Draft Environmental Impact Statements	22
§11-200.1-26 Comment Response Requirements for Draft Environmental Impact Statements	22
§11-200.1-27 Content Requirements; Final Environmental Impact Statement	16, 17, 18
§11-200.1-28 Acceptability	23
§11-200.1-29 Appeals to the Council	24
§11-200.1-30 Supplemental Environmental Impact Statements	26, 27, 28, 29
Subchapter 12 National Environmental Policy Act	
§11-200.1-31 National Environmental Policy Act Actions: Applicability to Chapter 343, HRS	25, New
Subchapter 13 Retroactivity and Severability	
§11-200.1-32 Retroactivity	New
§11-200.1-33 Severability	30

B. General Changes

The Proposed Rules make numerous changes to the rules that enhance readability. In general, changes to grammar and spelling, breaking long paragraphs into lists, reordering paragraphs, deleting redundant language, or similar edits are considered housekeeping and are not discussed in the sections below.

The most frequent general change is editing “which” to “that”. “Which” is appropriate where the following clause is not necessary to the meaning of the sentence and is descriptive of the clause that precedes it. “That” is appropriate when the preceding clause is dependent on the clause following “that”; the words after “that” are essential to the meaning of the sentence. Numerous instances of “which” in the 1996 Rules are changed to “that” in the Proposed Rules.

While the Legislative Reference Bureau (LRB) recommends to not use acronyms or abbreviations in rules, the LRB recognizes that in some cases their use is appropriate. For example, in Chapter 11-55, HAR, Water Pollution Control, “National Pollutant Discharge Elimination System” is abbreviated as “NPDES”. This reflects the reality that most people interacting with these administrative rules use “NPDES” more than the full name and use of the abbreviation enhances readability of the rules.

Similarly, in the environmental review process, use of certain acronyms and abbreviations is integral to meaningfully participating in the process. The following are considered important and integral acronyms and abbreviations and therefore are used in the Proposed Rules to enhance readability:

- EA: environmental assessment
- EIS: environmental impact statement
- EISPN: environmental impact statement preparation notice
- FONSI: finding of no significant impact
- HAR: Hawaii Administrative Rules
- HRS: Hawaii Revised Statutes
- NEPA: National Environmental Policy Act

The Proposed Rules replace all instances of “assessment” with “EA” and clarify whether it is specifically referring to a draft or final EA. Similarly, the Proposed Rules replace all instances of “statement” with “EIS” and clarify whether it is specifically referring to a draft or final EIS.

C. Topical Changes

Digitizing the Process

When the 1996 Rules were promulgated, home use of computers was just beginning. Internet was still paid for by the minute and most communication still relied on physical mail. *The Environmental Notice* was physically mailed to subscribers. Proponents also physically mailed copies of EAs and EISs to parties requesting it.

Today, *The Environmental Notice* is distributed electronically and EAs, EISs, and other environmental review documents are freely available in OEQC's online database. Many of the mailing and print-copy requirements for environmental review documents were included in the 1996 Rules to ensure access. With widespread digital distribution, these concerns are no longer as prominent. The Proposed Rules, therefore, make modifications in many areas related to digitization. For example, proposing agencies and applicants are no longer required to mail individual responses to commenters because the responses are easily accessible in the document posted online. Some paper copies of EAs and EISs, however, are still required in the Proposed Rules. For example, a copy of a draft EA must be given to the library in the area most affected by the action and one filed with the State Library Document Center.

Programmatic Approaches and Defining Project and Program

The Proposed Rules weave in the concept of programmatic environmental review that may apply to an exemption, EA, or EIS. This approach has evolved from Version 0.1 to the current Proposed Rules. Programmatic environmental review is sometime referred to as being at the "planning-level", and project-based environmental review is sometimes referred to as "site-specific". Programmatic environmental review is most appropriate for evaluating the impacts of a wide range of individual projects; implementation over a long time-frame; or implementation across a wide geographic area. The level of detail in programmatic environmental review should be enough to make an informed choice among planning-level alternatives and broad mitigation strategies. This type of review allows for analysis of the interactions of a number of planned projects or phases in a plan. This broader level of review may satisfy compliance with chapter 343, HRS as described in the new section on use of prior exemptions, FONSI, and accepted EISs or may be followed by site- or component-specific exemptions, EAs, or EISs that are based on the approved or accepted programmatic document, a process known as "tiering", as the elements of the program are proposed to be implemented.

Version 0.1 of the Proposed Rules proposed a distinct section covering "Programmatic EISs". The Council realized that setting forth a programmatic approach to EISs in a distinct section would require that same section to be replicated for exemptions, EAs, and potentially supplemental EISs as well. This approach also would have resulted in the default process becoming the "project" process and would have created a bifurcated process for projects and programs that raised questions about being within the authority set by chapter 343, HRS. It also raised questions about rights to action involving this bifurcated process; whether someone could sue to require someone to undergo the "project" versus the "program" pathway.

In Version 0.2, the proposed distinct section was deleted, and the concept of a preparation of a programmatic EA or EIS was inserted into a proposed "Environmental Assessment Style" section and the existing "Environmental Impact Statement Style" section. In general, those sections clarified that more detail was necessary for actions that had site-specific impacts and less detail was necessary for broader actions that were still in a more conceptual phase and intended to be implemented in multiple locations or in phases. Versions 0.1 and 0.2, however, did not define "project" or "program", which made discussion of "programmatic" environmental review more complicated.

While the Council was drafting Version 0.3, the Supreme Court of Hawaii issued its decision in *Umberger v. Department of Land and Natural Resources*, 403 P.3d 277, 284 (Haw. 2017). Because chapter 343, HRS and the 1996 Rules lacked a definition for project or program, the court looked to the Merriam-Webster Dictionary for the plain-meaning of those terms. The court provided: “‘Program’ is generally defined as ‘a plan or system under which action may be taken toward a goal.’ ‘Project’ is defined as ‘a specific plan or design’ or ‘a planned undertaking’” (*Umberger v. Department of Land and Natural Resources*, 403 P.3d 277, 290 (Haw. 2017)). In drafting, the Council noted that the definition for “program” provided by the court included the word “action”, which is defined in chapter 343, HRS as “a project or program”. Therefore, the Council believed that further clarification was necessary.

To provide greater clarity and to be able to discuss the concept of “programmatics” more succinctly, in Version 0.3 the Council proposed definitions for “project” and “program”. The Proposed Rules substantially retain these proposed definitions from Version 0.3. Using the definitions to distinguish between projects and programs, the Proposed Rules also allow for the preparation of programmatic exemptions, EAs, and EISs.

“Green Sheet”

The “green sheet” process is an adaptation of the City and County of Honolulu Department of Planning and Permitting’s internal review process (referred to as the “green sheet”) for documenting chapter 343, HRS analysis. The Council has modified this concept to incorporate considerations that the U.S. Bureau of Land Management and U.S. Department of Transportation (USDOT) use in their own NEPA adequacy analysis.

During the Council’s rules revision process, questions arose about standardizing how agencies conduct evaluations of the need to prepare a supplemental EIS. Other stakeholders raised questions about how an agency would resolve whether an action is covered by a previous determination or accepted EIS; a project is covered by a programmatic exemption, EA or EIS; or a federal NEPA EA or EIS meets the requirements of chapter 343, HRS. Others recommended incorporating the USDOT re-evaluation process for considering when a Supplemental EIS may be warranted.

For the supplemental EIS question, the 1996 Rules (Section 27) provide that an agency submit to OEQC for publication a determination of whether a Supplemental EIS is required or not required. The Proposed Rules retain this requirement. Note that the Proposed Rules group the Supplemental EIS section into the subchapter on EISs. The “green sheet” is a process proposed in section 11-200.1-11 that helps an agency with documenting its decision-making about whether a proposed action fits within an existing chapter 343, HRS document or determination or requires additional environmental review.

Section 11-200.1-11 is a new section that directs agencies on applying a new activity to an existing HEPA process but providing three criteria for determining when an activity is covered:

- (1) The proposed activity was a component of, or is substantially similar to, an action that received an exemption, FONSI, or an accepted EIS (for example, a project that was analyzed in a programmatic EIS);
- (2) The proposed activity is anticipated to have direct, indirect, and cumulative effects similar to those analyzed in a prior exemption, final EA, or accepted EIS; and
- (3) In the case of a final EA or an accepted EIS, the proposed activity was analyzed within the range of alternatives.

Concluding “yes” to the three criteria means that the proposed action fits within one of the circumstances. Concluding “no” means that a separate chapter 343, HRS analysis is needed; that is, the agency needs to decide if an exemption, EA, or EIS is appropriate. In either case, the agency may choose to publish the determination with the OEQC for publication in the periodic bulletin.

For NEPA, an agency, in the act of issuing an exemption, FONSI, or acceptance, would in effect “certify” that the federal document and process meets the requirements of chapter 343, HRS. That is, if an agency were to issue a FONSI for a federal EA that was not published in the periodic bulletin, then the agency would be at fault for not fully complying with chapter 343, HRS. Similarly, an agency issuing an acceptance based on a federal EIS would be affirming by issuing the acceptance that the federal EIS meets the content and process requirements of chapter 343, HRS, including any provisions related to NEPA as set forth in section 11-200.1-31.

Following adoption of the Proposed Rules, the OEQC will develop guidance on creating a “green sheet” equivalent (i.e., a standardized form) that helps agencies with tracking determinations that an activity is covered by an existing chapter 343, HRS process, such as a programmatic EIS covering the action; whether a supplemental EIS is required; and whether NEPA is an aspect of the action. The Council notes that the “green sheet” may vary by agency, depending on the agency’s specific needs.

Exemptions

One of the Council’s goals was to update the exemption process. The overall proposed changes are intended to increase agency use of exemptions, provide incentives for updating exemption lists and obtain Council concurrence with the lists on a regular basis, and increase timely public access to information about exemptions. See the sections of this Rationale Document regarding subchapter 8, Exempt Actions, List, and Notice Requirements for a detailed discussion of the proposed changes to the exemptions subchapter. The following is the primary change in the Proposed Rules from Version 0.3.

Section 11-200.1-16 revises the exemption list to consist of two parts. The first part would be those types of actions that the agency considers to be the equivalent of *de minimis*; that is, they are routine operations and maintenance, ongoing administrative activities, and other similar items.

This category of activities was proposed under section 11-200.1-8, General Applicability, in Version 0.3. The Proposed Rules removed that section and now require agencies to consider in advance what activities the agency considers to be *de minimis*, and to include those in Part 1 of the agency's exemption list. By including them in the exemption list, the agency can alert staff to situations where an activity might be in the gray area of a project or program for the purposes of chapter 343, HRS but perhaps not rising to the level of requiring environmental review as explained by the Hawaii Supreme Court in several of its decisions. Activities that are included in the first part of the exemption list would be presumed to not require documentation (i.e., an exemption notice) or consultation. In effect, these are the everyday things that government does, from repainting buildings to fixing plumbing and purchasing office supplies. Many of these items already exist on agency lists because they fall under one or more of the classes in the 1996 Rules. After adoption of the Proposed Rules, the agency would have seven years to reorganize and update its exemption list to comply with the Proposed Rules (see section 11-200.1-32, Retroactivity for more).

Affordable Housing

See the discussion in Section 11-200.1-15 General Types of Actions Eligible for Exemption for discussion about the exemptions regarding affordable housing.

Climate Change

The Proposed Rules incorporate sea level rise into significance criterion 11. Under the Proposed Rules, when determining whether preparation of an EIS is required approving agencies must consider whether a proposed action is likely to have a substantial adverse effect on a sea level rise exposure area, such as exacerbating coastal erosion. They must also consider whether the proposed action is likely to suffer damage if it is implemented due to being located in a sea level rise exposure area.

Additionally, the Proposed Rules amend criterion 13 to require approving agencies to consider in a significance determination whether a proposed project will emit substantial greenhouse gases at any stage or may emit substantial greenhouse gases as an indirect or cumulative impact.

The *Hawaii Sea Level Rise Vulnerability and Adaptability Report*, released in December 2017 by the Department of Land and Natural Resources, calls on the OEQC to develop guidance on addressing climate change in EAs and EISs. Guidance from the OEQC will be forthcoming after the rules update is completed. In developing the guidance, the OEQC will look to the Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews, issued by the Council on Environmental Quality Control on August 5, 2016 ([81 FR 51866](https://www.federalregister.gov/documents/2016/08/05/2016-18620/final-guidance-for-federal-departments-and-agencies-on-consideration-of-greenhouse-gas-emissions-and); <https://www.federalregister.gov/documents/2016/08/05/2016-18620/final-guidance-for-federal-departments-and-agencies-on-consideration-of-greenhouse-gas-emissions-and>).

“Direct-to-EIS”

In 2012 the Legislature amended chapter 343, HRS to allow for agencies and applicants to directly prepare an EIS when there was a clear potential for significant impact. The 1996 Rules are written such that an EA that is prepared prior to an EIS is part of the definition of an EIS and is one of the steps in the process of developing an EIS. The Proposed Rules remove preparation of an EA from the definition of an EIS and allow for EISs to begin at the EIS preparation notice stage without first preparing an EA.

The 1996 Rules created confusion about the requirements for an EISPN when an applicant or proposing agency began with an EIS versus beginning with an EA and finding that an EIS is needed. To reduce this confusion, the Proposed Rules standardize the requirement of an EISPN regardless of how an applicant or proposing agency begins an EIS.

The Proposed Rules include a public scoping meeting requirement and incorporation of public feedback from the scoping meeting into the draft EIS. In the past, the preparation of an EA would provide the public an early opportunity to provide comments on an action. The scoping meeting requirement at the EISPN phase balances the increased efficiency of proceeding directly to an EIS with providing adequate opportunity for public engagement.

Because the 1996 Rules assumed that an EA would be done before an EISPN, the content requirements for an EISPN are few. In the Proposed Rules, those details are intended to be filled out with the preparation of the draft EIS and with incorporation of public feedback from the mandatory scoping meeting and any other public consultation.

Republication of EAs or EISs

On occasion, an agency or applicant would like to extend a public comment period for an EA or EIS. The statute is silent on extending public comment periods. However, it does allow for an applicant to request an agency to extend the acceptance period by fifteen (15) days (HRS § 343-5(e)).

In the past, agencies have offered extended comment periods to allow the public more time to engage in the process and provide additional feedback. While this is laudable, it creates complications for the environmental review process. If an agency does not announce this extension through *The Environmental Notice*, then not all stakeholders may be aware of the extension. In effect, this gives some members of the public more time than others. Also, an extension of time creates uncertainty in legal standing for individuals who submit comments after the statutory deadline of a comment. The statute sets clear limitations on rights to pursue legal remedies, one of which is having commented during the draft EIS comment period. Extending comment deadline creates questions of standing for the courts.

To meet the need of additional comment time while staying within the statute, the Proposed Rules add a new section on republishing EAs and EISs for additional comment time. This creates a second comment period of thirty (30) days for draft EAs and EISPNs, and forty-five (45) days for draft EISs.

For someone commenting during the republication period, their comment would be treated the same as having been submitted during the initial publication period. That is, the proponent would have to respond to the comment and the commenter would have legal standing. For comments received in between publication periods, these would not have legal standing because they would not be submitted during a legal window.

The OEQC will publish guidance to agencies recommending that they contact any members of the public who submit comments between publication periods to recommend that the commenter resubmit the comment during the re-publication comment period.

Response to Comments

The Proposed Rules make several changes to how proposing agencies and applicants respond to comments. As discussed below, the Council also considered removing but ultimately retained the qualifying word “substantive” in the Proposed Rules as a threshold for the response requirement.

Individually Mailed Responses, Comment Grouping, and Form Letters/Petitions

When the 1996 Rules were promulgated, the main method of EAEIS dissemination was through paper copies of the documents. It was also essential that hardcopies of responses be mailed to commenters so that they could access the response, which would otherwise predominantly be available only through a paper copy of the EA or EIS at the library or other certain physical locations.

Today, EAs, EISs, and other environmental review documents are easily accessible through the OEQC website. Accordingly, the Proposed Rules have introduced changes based on the wide accessibility of EAs and EISs online.

First, the Proposed Rules no longer require a written response to be physically mailed to each commenter. Comments must still, however, be responded to and appended to the final EA or final EIS, with some minimal exceptions.

Second, because comments no longer must be mailed individually to commenters, the Proposed Rules allow proposing agencies and applicants to respond to comments based upon the “grouping” model that federal environmental review under NEPA allows. Proposing agencies and applicants may analyze the comment letters they receive, identify the topics and issues raised in those comment letters, and then prepare a single response for each issue raised by topic. This particularly increases efficiency when many comment letters are received that raise the same issues. Grouping also gives the approving or accepting agency, and the public, a comprehensive understanding of all the issues raised under a single topic.

The Council received and considered comments from the public that “grouping” may allow proposing agencies or applicants to side-step substantive comments by not addressing specific details raised within a comment on a topic. To prevent this, the Proposed Rules draw a distinction between “topic” and “issue”. As an example, many comment letters may contain portions addressing endangered species. Some may be concerned about monk seals, while others may be concerned about hawksbill turtles. A proposing agency or applicant could group all the comments related to endangered species under one topic, and then have two separate issues: monk seals and hawksbill turtles. Within those issue headings, the proposing agency or applicant must then address each substantive comment related to monk seals or hawksbill turtles. Although the comments may be grouped, the substance of each substantive comment must be addressed.

There were also concerns that without a physical letter, commenters would not be able to determine whether their comments received a response. To address this, when grouping comments, proposing agencies and applicants must include a list of the commenters whose comments are being addressed under each topic heading or section. Further, all comment letters containing substantive comments must be appended to the final document (e.g., FEIS).

The Proposed Rules also allow proposing agencies and applicants to continue the current practice of providing a separate response for each comment letter, wherein each substantive comment presented in the comment letter must be addressed. Under this practice, the response letter is usually included before or after the comment letter, and the commenter may clearly identify that a response has been provided. Although not required, proposing applicants and agencies may mail written responses to commenters.

The Proposed Rules additionally address the increasing use of form letters and petitions. The Proposed Rules attempt to ensure recognition of the commenters who submit identical or near-identical comments and to provide an efficient process to respond to the raised issues.

To do this, the Proposed Rules allow proposing agencies and applicants to respond to form letters and petitions with a single response or, if following the grouping procedure, to address the issues raised in the form letter in the appropriate topic areas. Only one representative sample of a form letter or petition must be appended to the document. However, all the commenters who submitted the form letter or signed the petition must be identified either in the single response, or in the topic response. If it is more efficient, instead of listing the names included on a petition, the proposing agency may simply include all copies of the petition, and similarly, may also include all copies of the form letter rather than including a sample and listing the names of those who provided the identical or near-identical comments.

The Council received feedback that the form letter process may allow proposing agencies or applicants to overlook form letter comments that add in additional substantive points. The Proposed Rules address this by requiring that form letters that have additional substantive points be appended in full to the document, and receive a response, either as a separate response, or as part of a grouped response.

“Substantive” Comments

In Version 0.2, the Council considered and received feedback on requiring a response to all comments, as opposed to requiring a response to “substantive” comments. Removing the word “substantive” ensures that all comments will receive a response, but created concerns about increased burdens on the proposing agency and applicant to respond to statements within a comment letter that are clearly outside the scope of the action, that are inflammatory, or that are simply formalities or pleasantries. Taking these concerns into account, Version 0.3 reinserted the word “substantive” into the Proposed Rules to retain the qualification that only “substantive” comments require a response. Version 0.3 also emphasized that the accepting authority had to be satisfied that a comment was “substantive” or not and, if it was, had received a commensurate response.

The Proposed Rules retain the word “substantive” and include direction to the accepting authority. The Council also notes that in the NEPA context “substantive” generally means that a comment addresses some specific aspect of the proposed action or the document (e.g., draft EA or draft EIS).

Scoping Meetings

In the 1996 Rules, the EISPN is followed by a 30-day comment period to help scope the contents of the draft EIS. The proponent has the option to hold a scoping meeting. If the proponent chooses to hold a scoping meeting, then the proponent must treat oral and written comments the same; that is, oral and written comments from a scoping meeting have to be written down and responded to in the draft EIS. In practice, many proponents choose to either not hold scoping meetings, or hold meetings that are similar but do not meet the legal description of a scoping meeting, which in turn removes the legal requirement to respond to oral comments.

The direct-to-EIS change to the statute also resulted in the public expressing concerns that they now have less information when an EISPN is published. Prior to the statute change, an EA would be prepared as part of the EISPN, usually including a comment period from draft to final EA. Since the change in statute, most EISs begin with an EISPN and an EA is not prepared. Because the 1996 Rules assume an EA has been done before an EISPN, the content requirements for an EISPN are few. The public often requests a scoping meeting now as a way to get more information about a proposed action.

At the federal level, NEPA requires a scoping meeting for EISs. In Hawaii, given the statutory direct-to-EIS change and the importance of focusing the document on the important issues (scoping), the Council believes requiring a scoping meeting is appropriate and timely.

In the case of a proposed action occurring on multiple islands, a scoping meeting is required to be held on each island affected. Requiring a scoping meeting addresses the public’s need to be better informed about a proposed action while giving applicants the opportunity to meaningfully engage the public.

The Council recognizes that requiring a scoping meeting will add a new cost to undertaking an EIS. To balance this additional cost, the Council is requiring written comments received at a scoping meeting be responded to in writing while oral comments be audio recorded and submitted to the OEQC and oral comments summarized in the draft EIS.

The Council reviewed the EISs prepared since 2012 and found that the number of EISs averaged about eleven per year, most which agencies proposed. Only state agencies prepared statewide EISs over the past five years, which indicates that the requirement to hold scoping meetings on multiple islands would have limited relevance to applicants. Where it may happen to be relevant, multiple scoping meetings are unlikely to be cost prohibitive or the determining factor in a proposed action's process or implementation.

NEPA-HEPA

The Proposed Rules seek to increase efficiency and harmonization of federal and state environmental review where both are necessary. The Proposed Rules promote the use of a single document that satisfies both federal and state environmental review and goes through a single comment period for the purposes of both. The Proposed Rules encourage the use of the NEPA environmental review document, but require that each agency make an independent determination pursuant to chapter 343, HRS of the necessary level of environmental review. A NEPA document (such as an EA or EIS) cannot be used as a chapter 343, HRS document if it does not meet the requirements for chapter 343, HRS review (including required public comment periods). When a federally prepared EA or EIS meets all the process and content requirements, then a Hawaii decision-maker can use the federal document. This can be noted in the "green sheet".

The Proposed Rules contain provisions for agency decision-makers to make their own decision about the necessary level of environmental review under chapter 343, HRS while considering existing federal information. For example, NEPA could allow for a categorical exemption, while chapter 343, HRS may require an EA or even an EIS. Alternatively, NEPA could require a federal EA, while chapter 343, HRS may allow for an exemption.

Retroactivity

During the Council's rules update process, agencies and applicants expressed concerns regarding how the process requirements for actions that were undergoing environmental review when the Proposed Rules are promulgated into law would apply. Agencies and applicants also expressed concerns regarding actions that may have completed the environmental review process but after litigation are required to go through the process a second time because of the litigation. To reduce uncertainty about when the Proposed Rules would take effect relative to a proposed action going through the environmental review process, the Council proposed a new retroactivity section in Version 0.2 and modified the language in Version 0.3.

The principle underlying the retroactivity section is that proposed actions that have completed a formal public engagement step shall continue under the 1996 Rules for five years from the promulgation of the Proposed Rules.

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For EAs, this means once a draft EA has been published, the proposed action remains under the 1996 Rules until either it receives a determination (FONSI or EISPN) or five years have passed.

Similarly, for an EIS, publication of the EISPN would mean the proposed action stays under the 1996 Rules until either a determination is made (acceptance or non-acceptance) or five years have passed. This ensures that the proponent has a consistent process and the public has an expectation of the process for its duration.

This section also allows agencies to maintain their exemption lists for up to seven years before needing to obtain Council concurrence. The retroactivity period allows for an agency to review its existing exemption list to reflect the changes associated with the Proposed Rules.

III. Section-Specific Changes

Subchapter 1 Purpose

Subchapter 1 (Purpose) creates a distinct subchapter for the section setting forth the purpose of chapter 11-200.1, HAR. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-1 Purpose

Section 11-200.1-1 expresses the purpose of chapter 11-200.1, HAR. It consolidates the policy statements about conducting EISs into this section and reframes the policy statements to be about the environmental review process as a whole. Section 11-200-1, HAR (1996) was a standalone paragraph. It is now numbered and combines other sections from chapter 11-200, HAR (1996) addressing the purpose of EAs and EISs. Subsection (a) of 11-200.1-1 was formerly section 11-200-1, HAR (1996).

Subsection (b) derives from 11-200-14, HAR (1996), “General Provisions”, which is the first section in subchapter 7, “Preparation of Draft & Environmental Impact Statements” under the 1996 Rules. It is modified to apply to both EAs and EISs. The subsection emphasizes that EAs and EISs should be prepared at the earliest practicable time and the spirit in which the documents should be prepared. It emphasizes that the purpose of preparing the documents is to enlighten decision-makers about any environmental consequences, and the addition “prior to decision-making” emphasizes the timing of when an EA or EIS should be prepared. EAs and EISs are intended to inform decision-makers prior to decision-making, therefore an after-the-fact EA or EIS would be inappropriate.

Subsection (c) combines language from section 11-200-19, HAR (1996) regarding Environmental Impact Statement Style to make it applicable to both agencies and applicants and to all environmental review documents. Applicants are authorized to prepare both the EA and EIS. The language is modified to be grammatically correct and increase readability.

Paragraph (c)(3) is new language regarding consultation. Council members and numerous commenters raised concerns that the process of “consultation” had in some cases become a mere formality, without a true, open, and mutual dialogue occurring between action proponents and members of the public. Paragraph (c)(3) provides the spirit in which consultation should be conducted with both agencies and members of the public.

Several housekeeping changes are made consist with the discussion above in the General Changes section. In addition, the terms “environmental impact statement” and “environmental assessment” are introduced and the acronyms “EIS” and “EA” provided. The syntax of the sentences is also revised to improve readability as appropriate.

Subchapter 2 Definitions

Subchapter 2 (Definitions and Terminology) creates a distinct subchapter for the section setting forth definitions and terminology used in chapter 11-200.1, HAR. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the Chapter through the subchapter headings.

§ 11-200.1-2 Definitions

Section 11-200.1-2 Definitions and Terminology was formerly section 11-200-2, HAR (1996). It sets forth the definitions and terms used in chapter 11-200.1, HAR. New language in the Proposed Rules direct agencies to use their own statutes and rules when a term is not defined in this chapter or in chapter 343, HRS. Several housekeeping changes are made, including arranging definitions into alphabetical order based on revisions to their wording. Various definitions are also amended to remove process steps, to clarify their meaning, or to make them more consistent with other proposed changes throughout the Proposed Rules.

The Proposed Rules propose to modify and amend the following definitions in the following ways:

The definition of “acceptance” is modified to remove redundant language. The modifications also remove process steps and redirect the reader to the appropriate section for determining those steps.

The definition of “accepting authority” is modified by removing the word “final” before “official who, or agency that” because the word “final” did not contribute additional meaning to the definition. The 1996 Rules provided only that the accepting authority “determines the acceptability of the EIS document”. The modified definition replaces that language and clarifies that the role of the accepting authority is to determine both that a final EIS is required to be filed pursuant to chapter 343, HRS, and that the final EIS fulfills the definitions and requirements of an EIS. It reflects changes to chapter 343, HRS in 2012 authorizing the direct preparation of an EIS without first preparing an EA.

The definition of “addendum” is modified to incorporate housekeeping changes and to include that an “applicant” also may attach an addendum to a draft EA or EIS.

The definition of “approval” is modified to remove the word “actual” from the phrase “prior to the actual implementation of the action” because “actual” was an unnecessary adjective. The definitions of “discretionary consent” and “ministerial consent” that were embedded in the 1996 definition of “approval” have been removed and made into a standalone definition under “discretionary consent”.

The definition of “approving agency” is modified to remove the word “actual” from the phrase “prior to the actual implementation of the action” because “actual” was an unnecessary adjective. The word “applicant” was added before the word “action” because an approving agency is only necessary within the environmental review context for applicants. Chapter 343, HRS only applies to applicants when an applicant action needs a discretionary consent (an approval) to proceed and contains a trigger under section 343-5, HRS.

The definition of “cumulative impact” is slightly modified for housekeeping purposes (“which” to “that”).

The definitions of “discretionary consent” and “ministerial consent” are removed from the 1996 definition of “approval” and made into a standalone, combined definition (discretionary consent and ministerial consent). The definition of “discretionary consent” is consistent with both chapter 343, HRS and the 1996 Rules language. The definition of “ministerial consent” is consistent with the 1996 Rules language. It is not a defined term in chapter 343, HRS.

The definition of “draft environmental assessment” is modified for housekeeping purposes, and to use the term “finding of no significant impact” in place of “a negative declaration determination”.

The definition of “effects” and “impacts” is slightly modified for housekeeping purposes (changing “which” to “that”), and to incorporate the language “immediate or delayed” that is part of the 1996 Rules definition of “environmental impact”, which is proposed to be deleted due to redundancy.

The definition of “EIS preparation notice” re-orders the words “EIS preparation notice” and “preparation notice”, and adds in the acronym “EISPN” because “EISPN” and “EIS preparation notice” are used most frequently throughout the rules. The definition is accordingly put in alphabetical order. The definition is updated to incorporate the direct-to-EIS route, which, pursuant to section 343-5(e), HRS, begins with an EISPN. Note that section 343-5(e), HRS, only allows an agency to use its judgment and experience to determine whether an agency or applicant may begin with an EISPN. An applicant must consult with an agency first to receive this authorization. Housekeeping changes are also included.

The definition of “EIS public scoping meeting” is added. An EIS public scoping meeting is a new requirement as part of the EIS preparation process and is outlined in section 11-200.1-23. The purpose of an EIS public scoping meeting is for interested parties to assist the applicant or agency in developing the scope of the EIS.

The definition of “environment” is modified to include health, so that it corresponds to the definition of “effects” or “impacts” under both chapter 343, HRS and the 1996 Rules. It is also modified to include “cultural”, as required by Act 50 Session Laws Hawaii of 2000.

The definition of “environmental assessment” is modified to clarify that an EA needs to provide sufficient evidence to make a significance determination as opposed to merely making that assertion, or, on the opposite end of the spectrum, providing an unduly long analysis. The statutory and 1996 Rules provide only that an EA is a written evaluation “to determine whether an action has a significant environmental effect”. The proposed definition expands it to “a written evaluation that serves to provide sufficient evidence and analysis to determine whether an action may have a significant effect”.

The definition of “environmental impact” is deleted because it was unnecessary with both “impact” and “environment” already included as defined terms. The words “immediate or delayed” have been incorporated into the definition of “effects” or “impacts”.

The definition of “environmental impact statement” is modified with housekeeping changes.

The definition of “exempt classes of action” is deleted because the concept of “classes of action” is removed in subchapter 8A. Subchapter 8A uses the term “general types” of action that may be exempted in order to be more consistent with chapter 343, HRS.

The definition of “exemption list” is added because it is a frequently used term in subchapter 8A. The new definition clarifies that the exemption process is part of the chapter 343, HRS process.

The definition of “exemption notice” is modified to reflect the updates to the exemption process under subchapter 8A. It recognizes that an exemption notice may be prepared for both agency and applicant actions. Further, it removes the reference that the notice be kept on file because in some circumstances a notice may be required to be published in the bulletin.

The definition of “final environmental assessment” is modified to reflect that chapter 343, HRS, now provides for a direct-to-EIS pathway when, based on an agency’s judgment and experience, the agency concludes that the proposed action may have a significant effect on the environment. The agency may then directly proceed to an EIS, or in the case of an applicant, may authorize an applicant to proceed directly to the preparation of an EIS. For both proposing agencies and applicants, the EIS preparation begins with an EISPN. Because the direct-to-EIS pathway exists, it is less likely that an agency will submit or require the applicant to submit a final EA without the preparation of a draft EA. The line referring to this process has therefore been removed. The definition has also been modified to include housekeeping changes.

The definition of “finding of no significant impact” removes the previous reference to “negative declaration” and reorders the definition alphabetically. The acronym FONSI is used most frequently in the Proposed Rules and in practice.

The definition of “impacts” is added to redirect the reader to “effects”. “Impacts” and “effects” are used synonymously throughout the Proposed Rules.

The definition of “National Environmental Policy Act” is slightly modified to include housekeeping changes, including adding in the acronym “NEPA”.

The definition of “negative declaration” is deleted and moved alphabetically under “finding of no significant impact”.

The definition of “office” includes minor housekeeping changes.

The definition of “periodic bulletin” is modified to include “bulletin” as an abbreviated reference to the “periodic bulletin”.

The definition of “preparation notice” is deleted and moved under “Environmental Impact Statement Preparation Notice” or “EISPN”. The term EISPN is used more frequently throughout the Proposed Rules.

The definition of “primary impact” is modified slightly to incorporate housekeeping changes.

The definition of “project” is added to distinguish projects and programs from one another and to facilitate discussion of a programmatic approach to environmental review. The proposed definition is aligned with but expands upon the definition set forth by the Supreme Court of Hawaii in *Umberger v. Department of Land and Natural Resources*, 403 P.3d 277, 290 (Haw. 2017). See the section on “Programmatic Approaches and Defining Project and Program” for additional details.

The definition of “program” is added to distinguish projects and programs from one another and to facilitate discussion of a programmatic approach to environmental review. The proposed definition is aligned with but significantly expands upon the definition set forth by the Supreme Court of Hawaii in *Umberger v. Department of Land and Natural Resources*, 403 P.3d 277, 290 (Haw. 2017). See the section on “Programmatic Approaches and Defining Project and Program” for additional details.

A definition of “proposing agency” is added because the term is used frequently throughout both the 1996 Rules and the Proposed Rules, but was not previously defined.

The definition of “secondary impact”, “secondary effect”, “indirect impact” or “indirect effect” is modified to correct grammar and readability.

The definition for “significant effect” or “significant impact” is amended according to Act 50 of the 2000 legislative session, which added “cultural practices of the community and State” to the definition of “significant effect” in chapter 343, HRS.

The definition of “supplemental EIS” is amended to refer to an “updated” instead of an “additional” EIS.

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The definition of “trigger” is added to refer to any use or activity listed in section 343-5(a) HRS. The 1996 Rules listed out what were commonly referred to as the “triggers” from section 343-5(a), HRS, which determine whether an action requires chapter 343, HRS environmental review. The Proposed Rules remove the list and refer to the “triggers” as establishing whether an action requires environmental review.

Subchapter 3 Computation of Time

Subchapter 3 (Computation of Time) creates a distinct subchapter standardizing the computation of time for all time periods prescribed by this chapter and chapter 343, HRS. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the chapter through the subchapter headings.

§ 11-200.1-3 Computation of Time

Section 11-200.1-3 (Computation of Time) is a new section. It clarifies and standardizes how days should be counted when there are time requirements within the Proposed Rules. The language is drawn from the Environmental Council Rules of Practice and Procedure, specifically section 11-201-14, HAR (1985), to ensure that the computation of time for all Council-related business is consistent.

This new section is intended to remove confusion about when comment periods begin and end. Section 343-5, HRS sets the comment periods for EAs as thirty (30) days and for EISs as forty-five (45) days from the publication date. The section clarifies that for counting purposes, the publication date is day zero and the last day of the period is included. Holidays and weekends (see [HRS § 1-29](#) and [HRS § 8-1](#)) are counted when counting to thirty (30) or forty-five (45) days. However, when the last day falls on a state holiday or non-working day, the deadline is the next working day.

For example, the OEQC publishes the periodic bulletin on April 8, 2018, which is a Sunday. For a draft EA published on that date, April 8 is counted as zero. State holidays and weekends are included in counting to thirty (30) days, but if the deadline falls on a state holiday, Saturday, or Sunday, the deadline is the next day that is not a State holiday, Saturday, or Sunday. In this example, the comment period deadline is Tuesday, May 8, 2018.

Subchapter 4 Filing and Publication in the Periodic Bulletin

Subchapter 4 (Filing and Publication in the Periodic Bulletin) (*The Environmental Notice*) creates a distinct subchapter setting forth information about the periodic bulletin and requirements for filing submittals to OEQC for publication in the periodic bulletin. This subchapter reorganizes the previous periodic bulletin subchapter from the 1996 Rules into three sections.

Section 200.1-4 addresses the purpose of the periodic bulletin and requirements for its publication. Section 200.1-5 establishes procedures for filing submittals for publication and consolidates previous language in various sections of the 1996 Rules regarding filing requirements into one place. Section 200.1-6 includes new language addressing occasions when an agency or applicant seeks to publish the same notice, document, or determination that it has published before and addresses the associated comment periods that arise when republication occurs.

§ 11-200.1-4 Periodic Bulletin

Section 11-200.1-4 (Periodic Bulletin) sets forth the publication requirements for the periodic bulletin. This section derives from sections 11-200-3, 11.2, 21, and 27 of the 1996 Rules. The previous Section 11-200-3, HAR (1996) has been divided into two sections in the Proposed Rules, including this section and one specific to filing (§ 11-200.1-5).

This section explicitly lists the types of notices, documents, and determinations published in the periodic bulletin, pursuant to chapter 343, HRS. The Proposed Rules require publishing lists of exempted actions, which the 1996 Rules do not require. This section also acknowledges that other statutes and rules (e.g., HAR § 13-222-12) have requirements for publication in the bulletin, such as shoreline certifications.

This section makes explicit that the OEQC may publish additional items in the bulletin on a time available basis as well as a space available basis. Given that the process is moving to a digital format, space is a less of a concern. However, the Proposed Rules reduce the submittal deadline from eight (8) days to four (4) days (see section 5 for more) so the capacity of the OEQC at any given point (i.e., staffing fluctuations) may limit the ability of the OEQC to include non-mandatory material in the bulletin.

This section also explicitly allows for the republication of any chapter 343, HRS notices, documents or determinations, and for notices of their withdrawal in accordance with other applicable requirements of the chapter.

§ 11-200.1-5 Filing Requirements for Publication and Withdrawal

This is a new section synthesizing language from multiple sections of the 1996 Rules (Sections 3, 9, 10, 11.1, 11.2, 20 and 23). In the 1996 Rules, the filing requirements are integrated into content or process steps and require numerous cross-references. This section consolidates and standardizes the filing requirements for each type of submittal document or determination into one section, making it easy to know where to look, who is responsible for the submittal, and to reference one section.

This section also captures notices, documents, and determinations required under chapter 343, HRS as well as requirements for publication pursuant to other statutes or administrative rules (e.g., HAR § 13-222-12 for shoreline applications).

Other changes of note include: decreasing the submission deadline from eight (8) days to four (4) business days as the OEQC no longer needs eight days to prepare the periodic bulletin; clarifying that the OEQC may ask for geographic data such as that included in a standard geographic information systems file; clarifying that the OEQC may require identification of the specific approval requiring an applicant to undertake environmental review; and adding language regarding the submission of paper copies to the State Library.

This section consolidates language on withdrawal from environmental review and makes explicit that both documents (i.e., EAs and EISs) and determinations can be withdrawn for any level of review.

The Proposed Rules require paper copies in only two circumstances, both related to the State Library. In line with the State Library's archival requirements, the Proposed Rules require submission of one paper copy of any draft or final EA or EIS to be deposited with the State Library Document Center. The second is that a paper copy of a draft EA, EISPN, or draft EIS must be deposited in the local library nearest to the proposed action. This is so that those living nearest to the proposed impacts and have limited electronic access (or capability) are still able to participate in the environmental review process at the scoping and draft phases.

For EISs, section 18 includes a requirement to record oral comments at the public scoping meeting. This requirement is incorporated into this section as part of the submittal requirement for a draft EIS. It is incumbent upon the preparer of the draft EIS to ensure that one unaltered/unedited copy of the recording of the oral comments is submitted to the OEQC. Therefore, it is recommended that backup methods for recording oral comments are implemented in the event of file corruption. Standard audio quality means all oral comments can be clearly heard.

§ 11-200.1-6 Republication of Notices, Documents, and Determinations

This is a new section addressing the practice of republication of chapter 343 notices, documents, and determinations. Chapter 343, HRS is silent on whether comment periods may be extended. In practice, proposing agencies, applicants, and approving agencies have sought to extend comment periods. When this occurs outside of the standard time period for public comment or outside of the notification process through the periodic bulletin, inconsistencies arise in the process creating questions of public notification and, in some cases, standing. To end inconsistently applied “extended comment periods”, this section states that the standard filing, comment, and response requirements of chapter 343, HRS apply each time something is published.

This section also provides that any agency or applicant that filed a chapter 343 notice, document, or determination may withdraw and republish a notice, document, or determination that has not been changed. Other submittals to the OEQC required by council rules, statute other than chapter 343, HRS, or an agency’s administrative rules other than this chapter, may also be withdrawn and republished, but must be done in accordance with that statute or those rules. There is no chapter 343, HRS obligation to publish an unchanged document again; however, a proposing or approving agency’s own statutes, rules, or procedures may require or call for it.

Lastly, this section clarifies when a public comment period is required with the republication of a chapter 343, HRS notice, document, or determination and how comments received in two or more comment periods for an unamended but republished notice, document, or determination are to be handled. The requirement to address comments in all comment periods resulting from multiple publications is to reduce the possibility of repeated publications to achieve fewer comments. Comments received outside of the multiple comment periods are not required to be addressed, but all comments received within multiple comment periods must be addressed.

Subchapter 5 Responsibilities

Subchapter 5 (Responsibilities) creates a distinct subchapter identifying the decision-making authority when agencies and applicants undergo chapter 343, HRS environmental review in various circumstances. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the Chapter through the subchapter headings.

§ 11-200.1-7 Identification of Approving Agency and Accepting Authority

This section was previously section 11-200-4, HAR (1996). All language in this section comes from sections 11-200-3, -4, and -23, HAR (1996) or is in addition to it.

State or County Lands and Funds Trigger: Language and cases where a proposed action has mixed state and county lands or funds or both lands and funds.

Approving Agency & Accepting Authority for Applicants: Provides that, in the case of applicants, the approving agency for environmental review compliance is also the accepting authority. Section 343-5(e), HRS states that for applicants “the agency initially receiving and agreeing to process the request for approval shall require the applicant to prepare an [EA] of the proposed action”, which is the approving agency. It further states that the “authority to accept a final statement shall rest with the agency initially receiving and agreeing to process the request for approval”. The agency with the authority to accept a final statement is the accepting authority, which is the agency initially receiving and agreeing to process the request for approval. This section adds language for applicants undertaking an EA.

Selection of Accepting Authority: Guidance to agencies on how to select the most appropriate accepting authority. This section instructs agencies and the OEQC to consider which agency has the most land or funds involved in an action when deciding which agency will be responsible for complying with chapter 343, HRS. Specifically, the changes to subsections (c) and (d) of this section provide a process for agencies to decide amongst themselves which agency shall be responsible for complying with chapter 343, HRS when two or more agencies are involved in an action. A list of considerations is provided for the agencies to make their decision, including a new consideration for which agency may have the most lands or funds involved in a proposed action. This section is also now divided into two subsections, providing that if agencies cannot decide, the OEQC shall decide for the agencies using the same considerations listed in subsection (c). This section also clarifies that the OEQC may not serve as the accepting authority but may make recommendations on the applicability of the Proposed Rules to an agency or applicant.

Subchapter 6 Applicability

Subchapter 6 (Applicability) creates a distinct subchapter setting forth procedures for determining whether an activity requires chapter 343, HRS environmental review. This subchapter reorganizes the previous applicability subchapter from the 1996 Rules to show the chronological steps that a proposing or an approving agency will follow when making this determination.

Section 11-200.1-9 addresses applicability of chapter 343, HRS environmental review to agency actions, particularly the the use of state or county lands or funds trigger, and emergency actions. Section 11-200.1-10 addresses applicability to applicant actions and incorporates section 343-5.5, HRS. Section 11-200.1-11 addresses the treatment of multiple or phased actions.

§ 11-200.1-8 Applicability of Chapter 343, HRS to Agency Actions

Formerly section 11-200-5, HAR (1996). All language in this section comes from section 11-200-5, HAR (1996) or is in addition to it. This section includes language in response to *Umberger v. Department of Land and Natural Resources*, 140 Hawai'i 500, 403 P.3d 277 (2017) ("For an activity to be subject to HEPA environmental review, the second requirement is that it must fall within at least one category of land uses or administrative acts (known as "triggers", now defined as a term in the Proposed Rules) enumerated in section 343-5(a), HRS (2010).").

This section specifically:

Lists the section 343-5, HRS triggers that necessitate environmental review under chapter 343, HRS.

Agricultural Tourism: Addresses exemptions for agricultural tourism (HRS § 343-5(a)(1)).

Emergency Actions: Addresses situations where an agency must respond to an emergency and that response would fall within the scope of chapter 343, HRS, but the nature of the emergency requires immediate response. For example, during a forest fire, an emergency firebreak may need to be cut. In the case of King Tides, an issue raised by one commenter, it would not extend to reconstruction of homes after the emergency has passed, but may apply to immediate measures taken to address the situation. The Proposed Rules emphasize that an agency must take immediate action to address the emergency for the exemption to apply. The agency has a responsibility to document the exemption when it undertakes an emergency action, whether an emergency proclamation has been made or not, in case a question arises about the lack of an assessment. That documentation, like other non-published exemptions, must be available upon public request and must be included in the list of exemptions required to be routinely filed with and published by OEQC pursuant to Section 11-200.1-17(d).

The language also ensures that the exclusions from chapter 343, HRS, are related to the declared emergency by requiring substantial commencement of the action within sixty (60) days of the emergency proclamation. (Under chapter 127A-14(d), HRS, a state of emergency automatically terminates after sixty (60) days.) The Council notes that supplemental emergency proclamations would re-start the 60-day count and extend the time that an action has to reach substantial commencement. This provision does not explicitly reference the possibility for extension because the extension is provided for under section 127A-14(d) and the Council does not have rulemaking authority under chapter 127A, HRS. The term “substantially commenced” is not defined here because the intent is to provide direction to agencies to timely implement the action but not define the standard for all agencies in all situations.

§ 11-200.1-9 Applicability of Chapter 343, HRS to Applicant Actions

Formerly section 11-200-6, HAR (1996), this section has been reorganized and is intended to clarify that there are two essential elements necessitating chapter 343, HRS review for applicant actions: a discretionary consent and a statutory trigger under section 343-5, HRS. This section further recognizes that an applicant action may require multiple approvals. These should be considered as part of the whole action and not as creating discrete actions. By incorporating reference to section 343-5(a), HRS in proposed subsection (a)(2), much of what was included in section 11-200-6(b), HAR (1996) becomes unnecessary and was thus removed. If section 343-5(a), HRS is amended, the incorporation of the statutory triggers by reference allows the rules to remain aligned with section 343-5(a), HRS without also requiring an amendment to the rules. This helps to ensure consistency between the rules and the statute over time.

This section explicitly includes an exception to the general requirements of chapter 343, HRS for agricultural tourism as provided under section 343-5(a)(1), HRS and chapter 205, HRS (which allow the counties to require an EA under chapter 343, HRS for any agricultural tourism use and activity in certain circumstances).

Additionally, this section includes the exclusion to chapter 343, HRS environmental review as provided for in section 343-5.5, HRS. That provision was added to chapter 343, HRS through the 2012 legislative amendments (L 2012, c 312 § 1).

This section includes definitions of four terms that apply only to subsection (b) of this section 11-200.1-10: “discretionary consent”, “infrastructure”, “primary action”, and “secondary action”.

§ 11-200.1-10 Multiple or Phased Actions

The language in this section comes from section 11-200-7, HAR (1996). The revised language replaces “project” with “action”. This section is meant to assist with clarifying the scope of an action to reduce the potential for segmentation. This section also clarifies that multiple or phased actions may be reviewed in an EA or EIS and do not necessarily require an EA prior to preparing an EIS.

§ 11-200.1-11 Use of Prior Exemptions, Findings of No Significant Impact, and Accepted Environmental Impact Statements to Satisfy Chapter 343, HRS for Proposed Activities

This is a new section drawing from section 11-200-13, HAR (1996). Section 11-200-13, HAR (1996) allowed the use of prior determinations and accepted EISs to satisfy chapter 343, HRS for proposed actions if the prior determination or accepted EIS was pertinent and relevant to the proposed action. The 1996 Rules admonished agencies to take a hard look before allowing use of prior determinations and accepted EISs in place of additional chapter 343, HRS environmental review. That section also included the concepts of tiering and incorporating portions of an existing determination or accepted EIS into environmental review of proposed actions, such as EAs and EISs.

Proposed section 11-200.1-11 separates out and clarifies how and when an agency may determine that a prior exemption, final EA or accepted EIS satisfies chapter 343, HRS for a proposed activity. In order for a proposed activity to use a prior exemption, final EA, or accepted EIS, the proposed activity must have been considered a component of or be substantially similar to the action that received the exemption, FONSI, or acceptance; the proposed activity must be anticipated to have similar direct, indirect, and cumulative effects as those analyzed in a prior exemption, final EA, or accepted EIS; and in the case of a final EA or accepted EIS, the proposed activity must have been analyzed within the range of alternatives. In essence, the agency must be able to determine that the proposed activity was covered under the prior exemption, FONSI, or accepted EIS.

This section particularly applies to situations where a programmatic EIS, and later in time a component of that programmatic EIS that was analyzed in detail is ready to be implemented. The component may on its own be considered an action for purposes of chapter 343, HRS, but because it was a component of an accepted EIS, is anticipated to have similar direct, indirect, and cumulative effects as those analyzed in the accepted EIS, and the proposed activity was analyzed in the range of alternatives in the accepted EIS, an approving agency may determine that chapter 343, HRS is already satisfied. The proposing agency or applicant may then proceed with other permitting requirements outside of chapter 343, HRS. An agency determining whether a prior accepted EIS satisfies chapter 343, HRS review for a proposed activity should also consider whether the accepted EIS was accepted at a time when environmental conditions and information were similar. If there have been significant changes since the time the accepted EIS was prepared, the proposed activity cannot be considered “similar” because the environmental impacts could be different than those analyzed in the accepted EIS.

This rationale for determining whether chapter 343, HRS review is necessary is an existing practice for many agencies when they are considering whether to undergo chapter 343, HRS environmental review or deciding whether an applicant must undergo chapter 343, HRS environmental review.

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The Proposed Rule intends to create a consistent process and provide agencies with direction on what to consider when determining if a proposed activity is covered under a prior exemption, final EA, or accepted EIS. The rules also create a mechanism for agencies to publish a determination and brief rationale that a prior exemption, final EA, or accepted EIS satisfies the chapter 343, HRS requirements for a proposed activity.

The proposed rule also provides that when an agency determines that a prior exemption, final EA, or accepted EIS does not satisfy chapter 343, HRS environmental review for a proposed activity, then the proposing agency or applicant should proceed to subchapter 7 to determine the level of environmental review necessary.

Subchapter 7 Determination of Significance

Subchapter 7 (Determination of Significance) creates a distinct subchapter to provide direction to agencies in deciding the level of review necessary to satisfy chapter 343, HRS. This subchapter logically follows subchapter 6 (Applicability) because it is the next step that agencies will take upon determining that chapter 343, HRS environmental review is applicable. This subchapter reorganizes the previous determination of significance subchapter from the 1996 Rules to show the chronological process that an agency will follow when determining the appropriate level of review, which may be an exemption, preparation of an EA, or direct preparation of an EIS.

Section 11-200.1-12 addresses circumstances in which an agency may consider previous determinations and previously accepted EISs when deciding the appropriate level of review for a new action and introduces the evaluation tool informally called the “green sheet” based on the City and County of Honolulu Department of Planning and Permitting worksheet. Section 11-200.1-13 provides that the proposing or approving agency use its judgment and experience to initially determine whether the appropriate level of environmental review is an exemption, preparation of an EA, or direct preparation of an EIS. Section 11-200.1-14 presents the significance criteria that agencies use as a basis for determining the appropriate level of review.

§ 11-200.1-12 Consideration of Previous Determinations and Accepted Statements

This section is former section 11-200-13, HAR (1996). The 1996 Rules section included three concepts: (1) the use of prior determinations and accepted EISs in place of chapter 343, HRS review for a proposed action; (2) tiering an exemption, EA, or EIS for a proposed action on a prior determination or accepted EIS; and (3) incorporation of information from a prior determination or accepted EIS into an exemption, EA, or EIS for a proposed action. Proposed section 11-200.1-12 addresses the first concept—the use of prior determinations and accepted EISs in place of further chapter 343, HRS review. Accordingly, the revised rule retains only the remaining concepts: tiering and incorporation by reference. The revised rule also makes explicit the language in section 343-5(g), HRS about which kinds of previous determinations may be used, including exemption notices, EAs, EISPNS, and previously accepted EISs.

Proposed section 11-200.1-12 also precedes this section, and it is assumed that an agency or applicant will consider the applicability of section 11-200.1-12 to a proposed activity prior to considering whether previous determinations or accepted EISs could be used in preparation of an exemption, EA, or EIS. Therefore, the subsection emphasizing that prior determinations and accepted statements must receive a hard look when used in place of chapter 343, HRS review has been deleted.

§ 11-200.1-13 Significance Criteria

Formerly section 11-200-12, HAR (1996), all language in this section comes from section 11-200-12, HAR (1996) or is in addition to it. This section presents the criteria that an agency is to use for determining whether an exemption, FONSI, EISPN, or acceptance is appropriate.

This section replaces the word “consequences” with “impacts” because both “primary impact” and “secondary impact” are defined, but the use of “consequences” introduced a new, undefined term that had been understood as a synonym for “impact”.

While section 345-5, HRS provides that an EIS is required for an action that “may” have a significant effect, the Hawaii Supreme Court has interpreted the word “may” to mean “likely”. For example, in *Kepoo v. Kane*, 103 P.3d 939, 958 (Haw. 2005) the Court held that the proper inquiry for determining the necessity of an EIS is whether the proposed action will “likely” have a significant effect on the environment. The Proposed Rules adopt this language to make it clearer to stakeholders what the court’s interpretation of the statutory language means. Each of the specific criteria following this phrase are revised to align syntax with the revised language “is likely to”.

The Proposed Rules add the word “adverse” to each of the specific criteria (where applicable). This language more closely matches the definition of “significant effect” in section 343-2, HRS, including mirroring the emphasis on “adverse” effects. The definition of “significant effect” in section 343-2, HRS:

means the sum of effects on the quality of the environment, including actions that **irrevocably commit** a natural resource, **curtail** the range of beneficial uses of the environment, are **contrary** to the State’s environmental policies or long-term environmental goals as established by law, or **adversely affect** the economic welfare, social welfare, or cultural practices of the community and State. (emphasis added)

The Proposed Rules retain the word “substantial” from the 1996 Rules.

Combining “substantial” and “adverse” is meant to set a standard that is higher than just having an effect and emphasizes that the focus is on negative effects rather than positive ones.

This change addresses the question of whether an action having substantial beneficial effects would require the preparation of an EIS or make an action ineligible for an exemption. The introductory language of the section still requires agencies to consider the sum of effects on the quality of the environment and the overall and cumulative effects of an action. For example, a proposed renewable energy project may have substantial beneficial effects with respect to energy and greenhouse gases but may also irrevocably commit to loss or destruction of a natural or cultural resource. In this case, an agency must still consider the sum of effects and the overall and cumulative effects, which could warrant the preparation of an EIS instead of issuing a FONSI, depending on the specific facts of the proposed action.

In addition to the above changes to the significance criteria, the following changes are also in the Proposed Rules. Criteria (2), (5), (6), (7), (8), (9), (10) have only the above grammatical and/or “substantial adverse” changes proposed.

Criterion (1): Rephrases the language to match the statutory phrasing while retaining the inclusion of “cultural” from the 1996 Rules and inserting “historic”, reflecting the requirement that historic sites are a trigger in chapter 343, HRS and are given prominent consideration in the environmental review process. While NEPA may consider historic properties as a subset of cultural resources, the Proposed Rules use “historic” and “cultural” in sequence in the definitions for “environment” and “effects”.

Criterion (3): Includes other laws because the statutory definition of “significant effect” is not narrowed to chapter 344, HRS and many other statutes set forth environmental policies or goals. This language acknowledges other laws with environmental goals such as the State Planning Act or section 269-92, Renewable Portfolio Standards, HRS. “Laws” may be broadly understood to include common law and executive orders so long as they establish long-term environmental policies or goals, but not to encompass all statutes, administrative rules, and court decisions.

Criterion (4): Revises language to match the definition of “significance” in section 343-2, HRS. Statutory language was amended by Act 50 (2000) to include cultural practices as part of the definition of significance.

Act 50, Session Laws of Hawaii 2000 requires the consideration of impacts on cultural practices when making a determination of significance effect. It amended the definition of “significant effect” in section 343-2, HRS to mean “the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State’s environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State”.

Act 50 also amended the definition of “environmental impact statement” or “statement” in section 343-2, HRS to include the disclosure of effects of a proposed action on cultural practices, as follows:

“environmental impact statement” or “statement” means an informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

The initial statement filed for public review shall be referred to as the draft statement and shall be distinguished from the final statement which is the document that has incorporated the public's comments and the responses to those comments. The final statement is the document that shall be evaluated for acceptability by the respective accepting authority.

Per Act 50, cultural practices are an integral component of the significance criteria and must be considered in making a significance determination.

Criterion (11): Adds the sea level rise exposure area to the list of example areas that could be considered environmentally sensitive.

The included language incorporates sea level rise exposure area from the December 2017 Climate Change Mitigation and Adaptation Commission report. This criterion addresses concerns related to climate change adaptation such as impacts from sea level rise, increased hurricane frequency and/or intensity, and endangered species migration. Note that the list is not exhaustive and other areas not listed here may be considered environmentally sensitive, including areas likely to experience wave inundation, increased exposure to hurricanes, or flooding (including inland) outside of a designated flood plain.

Criterion (12): Clarifies that both the daytime and nighttime effects on scenic vistas and viewplanes must be considered when determining if an action is likely to have a significant effect. Bright lighting around a site at night, for example, may disrupt scenic vistas or viewplanes even though the site is not conspicuous and does not otherwise have a substantial adverse effect on the scenic vista or viewplane during the day.

Criterion (13): This criterion addresses concerns related to energy and implicitly climate change mitigation. The Proposed Rules make this explicit by adding greenhouse gas emissions to this criterion. This criterion was the only addition to the significance criteria when the 1996 Rules were promulgated. Since then, the best available science indicates that greenhouse gas emissions have cumulative impact and have more sources than fossil fuel burning. A proposed action having substantial emissions (relative to Hawaii) may not be the result of energy use, especially as Hawaii progresses toward its 100% renewable energy goal.

§ 11-200.1-14 Determination of Level of Environmental Review

This is a new section that describes the pathways of chapter 343, HRS environmental review: exemption, EA resulting in a FONSI or EISPN, and EIS resulting in an acceptance or non-acceptance. Once an agency concludes that the proposed action is not covered by a previous determination or accepted statement (via the "green sheet"), the agency must then determine the appropriate review using its judgment and experience: exemption, EA, or EIS.

This section modifies language from sections 11-200-5(a) and 11-200-9(b)(3), HAR (1996) and from section 343-5(b), HRS, and section 343-5(e), HRS. This section requires agencies to inform applicants within thirty (30) days of a request for an approval of what level of environmental review the applicant must undertake. The section clarifies that the 30-day time period begins when the agency deems the request for approval to be complete. This section also sets forth the standard for an exemption using language from section 11-200-8, HAR (1996) and drawn from section 343-6(a)(2), HRS (“actions [that] will probably have minimal or no significant effects on the environment”).

Where an exemption is not appropriate and an action requires chapter 343, HRS environmental review, preparation of an EA beginning with a draft EA is required unless one of two situations exist. The first is that a proposing agency may begin with a final EA or an approving agency may authorize an applicant to begin with a final EA when it is anticipated that an EIS will be required, but more information is required to substantiate that determination (this was the process prior to the “direct-to-EIS” statutory change and agencies have expressed value in keeping it). The second is that an agency may follow the “direct-to-EIS” route as provided for in section 343-5, HRS.

Subchapter 8 Exempt Actions, List, and Notice Requirements

Subchapter 8 (Exempt Actions, List, and Notice Requirements) creates a distinct subchapter addressing the matter of exemptions. This subchapter divides the section 11-200-8, HAR (1996) regarding exemptions into three distinct sections.

Section 200.1-15 establishes the general types of actions under which an exemption may be declared. Section 200.1-16 provides direction to agencies for the creation of an exemption list. Section 200.1-17 provides direction to agencies on how to prepare an exemption notice, including when an agency is required to consult on the exemption and when the exemption notice must be published in the bulletin.

§ 11-200.1-15 General Types of Actions Eligible for Exemption

All language in this section comes from section 11-200-8, HAR (1996) or is in addition to it. This section sets forth the general types of actions eligible for exemption. It adds statutory language directly from section 343-6(2), HRS on the standard for declaring actions exempt: because they will probably individually and cumulatively have minimal or no significant effects.

The Proposed Rules remove the 1996 language regarding “classes of actions” as the statute does not use the term “classes” and the word has caused confusion. In its place, the Proposed Rules use “general types” to mirror the statute and frame the “types” of exemptions on agency exemption lists so that the hierarchy is clearer: general types (in rules), types (in agency-specific exemption lists), and exemptions (exemption notices).

The Proposed Rules do not include the “classes” 6 and 7 in the 1996 Rules as they are now included as a *de minimis* level of routine activities and ordinary functions in the Proposed Rules. They are addressed further in section 11-200.1-16, Exemption Lists.

The Proposed Rules make no changes to the language incorporated from the 1996 Rules for general types (2), (4), and (7), based on numbering in the Proposed Rules.

The remaining general types are revised as follows (numbering based on the Proposed Rules).

General Type (1): Replaces “negligible” with “minor” and removes “or no” before “expansion or change” because activities that are “negligible” and require “no expansion” and “no change” are now captured in the *de minimis* category and should be reflected in Part 1 of an agency’s exemption list.

General Type (3): Agencies, including different agencies within the same county, measure residence area differently. This language acknowledges the difference and directs the proposing agency or approving agency to use its own method of measuring for 3,500 square

feet. The language also replaces “persons” with “individuals” because “person” is a defined term in chapter 343, HRS and the Proposed Rules and that meaning is not used in this context.

General Type (5): Incorporates infrastructure testing such as temporary interventions on roadways to test new designs or effects on traffic patterns.

General Type (6): The Proposed Rules revise the general type for demolition of structures to better balance the concerns of historic preservation. The 1996 Rules did not allow for the use of the exemption if the structure was designated on the state or federal registers. Structures that might be eligible for designation could still be exempted for demolished (barring the standard exception to exemptions). Stakeholders expressed concern that eligible buildings of potential significance were being demolished while others expressed concern that any building more than fifty years old was too broad of a standard. To balance these concerns, the Proposed Rules use the phrase “meet the criteria” for listing because the criteria for listing on either the national register or Hawaii Register of Historic Places include more than being fifty years old. Section 13-198-8, HAR, states the criteria for listing on the Hawaii Register of Historic Places:

...The property meets or possesses, individually or in combination, the following criteria or characteristics:

- (1) The quality of significance in Hawaiian history, architecture, archaeology, and culture, which is present in districts, sites, buildings, structures and objects of State and local importance that possess integrity of location, design, setting, materials, workmanship, feeling, and association, AND:
 - (A) That are associated with events that have made a significant contribution to broad patterns of our American or Hawaiian history;
 - (B) That are associated with the lives of persons significant in our past;
 - (C) That embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic value, or that represent a significant and distinguishable entity whose components may lack individual distinction; OR
 - (D) That have yielded, or may be likely to yield, information important in prehistory or history;
- (2) Environmental impact, i.e., whether the preservation of the building, site, structure, district, or object significantly enhances the environmental quality of the State;
- (3) The social, cultural, educational, and recreational value of the building, site, structure, district, or object, when preserved, presented, or interpreted, contributes significantly to the understanding and enjoyment of the history and culture of Hawaii, the pacific area, or the nation.

This means that structures more than fifty years old but otherwise lack any historic significance or integrity could still use this exemption (assuming the standard caveats for any exemption). This language also better aligns the exemption standard with the helicopter facilities trigger in section 343-5(a)(8)(C) regarding any historic site as designated or under consideration for designation.

General Type (8): The Proposed Rules retain the general type for continuing administrative activities but delete the reference to purchase of supplies and personnel-related activities because those two items are captured in the *de minimis* category and should be reflected in Part 1 of an agency's exemption list.

General Type (9): The Proposed Rules incorporate an amendment to the 1996 Rules that was never compiled and promulgated. In 2007, the Environmental Council formally amended section 11-200-8, HAR to add the eleventh exemption category for affordable housing. Note that the term "affordable housing" was not defined at that time. Affordable housing should be understood in the same way as proposed under Proposed General Type (11).

General Type (10): The Proposed Rules add a new general type for affordable housing that meets certain criteria. The purpose of this proposed general type of exemption would be to support the orderly development of affordable housing in urbanized areas where affordable housing is a designated and zoned use. Per section 11-200-8(b), HAR (1996) and proposed section 11-200.1-15(d), HAR, exemptions are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment. That is, this exemption is not automatic.

Agencies define affordable housing differently. The Council considered multiple approaches to affordable housing, ranging from requiring 100% affordable housing at various mixtures of area median income (AMI) percentages to the language as proposed. Setting a specific mixture or requiring 100% affordable housing would set a standard unlikely to be met. Creating a standard for an exemption under chapter 343, HRS separate and distinct from a standard set by a proposing agency or approving agency but not grounded in a specific statute or policy goal would be difficult to justify. Because chapter 343, HRS is about disclosure by agencies to the public prior to making a decision or implementing an action, the Council believes that the public is best served by the agency using its own standard when considering whether a proposed action meets the meaning of "affordable housing". This is also consistent with General Type (10), acquisition of affordable housing, which is not defined, and with the Council's direction in section 11-200.1-2 to agencies to use their own statutes and rules for understanding terms that are not defined in chapter 343, HRS or the Proposed Rules.

In addition, the potential to integrate mixed-use (e.g., offices, retail) with affordable housing is an explicit goal of some state and county agencies. Allowing for the potential of mixed use while keeping the agency to its own criteria for affordable housing could promote better urban communities that are multi-income and multi-use. Therefore, this exemption directs agencies to use their respective affordable housing law.

For example, section 201H-36(a)(4), HRS sets forth one standard:

affordable rental housing where at least fifty per cent of the available units are for households with incomes at or below eighty per cent of the area median family income as determined by the United States Department of Housing and Urban Development, of which at least twenty per cent of the available units are for households with incomes at or below sixty per cent of the area median family income as determined by the United States Department of Housing and Urban Development.

This would apply when the Hawaii Housing Finance and Development Corporation is approving a proposal related to that standard, whereas each county has its own county ordinance that would be the controlling law for the respective county agency making decisions about whether to use county lands or funds. Note that chapter 343, HRS applies before chapter 201H, HRS and the Proposed Rules would not alter that order.

To reinforce the purpose of this exemption, several additional criteria are included.

This exemption would be applicable only when one or both of two possible triggers apply: the use of state or county lands or funds and Waikiki. The limitation to these two triggers is to keep the focus on the involvement of the state or county to support affordable housing development where the only reason someone would undergo environmental review is because government is subsidizing funding or leasing out land to assist the production of affordable housing. The Waikiki trigger is included because it is a developed, urbanized area that meets the other criteria of being classified state urban land and zoned to allow housing. The presence of other triggers such as use within a shoreline (including a Waikiki shoreline) or occurring within a designated historic site would mean this exemption would not be applicable.

The exemption would only be eligible for actions on land that has already been classified by the State Land Use Commission as urban. If the proposed action involves land classified as agriculture, conservation, or rural, or includes a boundary amendment to change the classification to urban, then the exemption would not be applicable.

The exemption would be eligible for land that has already been zoned by the county for housing. Each county organizes its zoning differently (or has distinct features) so this language is meant to acknowledge this variability. If the existing zoning for the proposed parcels do not allow housing, then this exemption would not be applicable. For example, Maui County has pyramid zoning, so industrial is not allowed in residential but residential is allowed in industrial. This language would account for this variability.

The exemption would not be eligible if a variance for shoreline setback is included. This acknowledges General Type (9), which states that zoning variances may be exempted except for shoreline setback variances. This also reinforces the significance criteria that identify the sea level rise exposure area and erosion-prone areas as environmentally sensitive areas.

In (d), reference to “subchapter 4” is added to capture both general types under section 200.1-15 and activities in the *de minimis* category to the provision specifying that an exemption may not be granted when the cumulative impact of planned successive actions is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment. For example, it may be routine groundwork to remove a small ailing tree outside an agency building, but if the tree is designated as an Exceptional Tree pursuant to chapter 58, HRS, then the normally routine activity may be significant and an exemption would be inapplicable.

§ 11-200.1-16 Exemption Lists

All language in this section comes from section 11-200-8, HAR (1996) or is in addition to it.

The Proposed Rules acknowledge that agencies are not required to create exemption lists and some agencies may not regularly conduct activities that rise to the level of requiring chapter 343, HRS environmental review. An agency without an exemption list may still apply an exemption by meeting the other requirements of this subchapter. To capture the discretionary nature of developing an exemption list, the Proposed Rules use the word “may” in subsection 11-200.1-16(a).

The Proposed Rules update the 1996 Rules language to reflect the other changes made to the exemption process in sections 15 and 17, such as renaming the “classes” to “general types”.

This section revises the exemption list to consist of two parts. The first part would be those types of actions that the agency considers to be the equivalent of *de minimis*; that is, they are routine operations and maintenance, ongoing administrative activities, and other similar items. This category of activities was proposed under section 11-200.1-8, General Applicability, in Version 0.3. The Proposed Rules removed that section and now require agencies to consider in advance what activities the agency considers to be *de minimis*, and to include those in Part 1 of the agency’s exemption list. By including them in the exemption list, the agency can alert staff to situations where an activity might be in the gray area of a project or program for the purposes of chapter 343, HRS but perhaps not rising to the level of requiring environmental review as explained by the Hawaii Supreme Court in several of its decisions. Activities that are included in the first part of the exemption list would be presumed to not require documentation (i.e., an exemption notice) or consultation. In effect, these are the everyday things that government does, from repainting buildings to fixing plumbing and purchasing office supplies. Many of these items already exist on agency lists because they fall under one or more of the classes in the 1996 Rules. After adoption of the Proposed Rules, the agency would have seven years to reorganize and update its exemption list to comply with the Proposed Rules (see section 11-200.1-32, Retroactivity for more).

The second part of the exemption list consists of the general types identified in section 11-200.1-15 and what types of actions the agency regularly undertakes which it considers to be exempt but for which documentation of the exemption is appropriate. Individual actions would be recorded in exemption notices as set forth in 11-200.1-17.

The Proposed Rules also clarify that both applicant and agency actions may be exempt. An approving agency may determine that a proposed activity does not rise to the level of an action that requires an exemption notice because the proposed activity likely will have no or negligible environmental impact (Part 1 of the agency's exemption list). The agency may also exempt a proposed action based on either part two of the approving agency's exemption list, or in accordance with a general type under section 11-200.1-15.

Agencies are required to submit their exemption lists for review and concurrence by the Council.

§ 11-200.1-17 Exemption Notices

All language in this section comes from section 11-200-8, HAR (1996) or is in addition to it. This section requires an agency to: create exemption notices for actions exempted under Part 2 of its exemption list or that the agency determines to be included within a general type of activity according to section 11-200.1-15; to maintain the exemption notices on file; and to provide a list of all exemption determinations to the OEQC for publication in the periodic bulletin on the eighth (8th) day of each month. This ensures timely notification to the public about unpublished exemption notices, but recognizes the potential hardship of requiring agencies to provide such notices twice a month. Agencies are also required to produce their exemption notices to the public upon request. Exemption notices should be prepared prior to undertaking an action, except in the case of an emergency action under section 11-200.1-8.

The Proposed Rules generally require consultation with outside agencies or individuals that have jurisdiction or expertise as to the propriety of the exemption, documentation of that consultation in the exemption notice, and publication of the exemption notice unless: (1) the agency has created an exemption list in accordance with the enacted rules; (2) the agency received Council concurrence within seven years of the proposed implementation of the proposed action; and (3) the action is consistent with the letter and intent of the agency's exemption list. Unpublished exemption notices must still be included in the list of exemption notices that the agency routinely provides to the office for publication in the bulletin pursuant to section 11-200.1-17(d).

This provision allows for agencies that do not have exemption lists to exempt an activity or action as the need arises. Not all agencies regularly interact with chapter 343, HRS and therefore, the Proposed Rules do not require all agencies to create exemption lists. When the occasion arises that an agency without an exemption list must comply with chapter 343, HRS and an exemption is the applicable level of environmental review, then consultation, documentation, and publication of the exemption in the bulletin are required.

On the other hand, agencies that regularly interact with chapter 343, HRS already have exemption lists. However, many agency exemption lists are decades old. The proposed consultation and publication exception is intended to create an efficiency incentive for agencies to create or update existing exemption lists and have those lists reviewed and concurred with by the Council on a consistent basis. The public has an opportunity to comment on the propriety of exemption lists during Council review and concurrence.

Subchapter 9 Preparation of Environmental Assessments

Subchapter 9 (Preparation of Environmental Assessments) creates a distinct subchapter addressing EAs. This subchapter provides direction to an agency when it has decided that preparation of an EA is the appropriate level of chapter 343, HRS environmental review. The sections are ordered by process sequence, starting with the consultation requirement prior to beginning a draft EA, and ending with the determination to issue an EISPN or a FONSI.

Section 11-200.1-18 describes the requirement of early consultation, addresses the scope of analysis and level of detail required in a draft EA, and the content requirements for a draft EA. Section 11-200.1-19 describes the process and content requirements for issuing a notice of an anticipated FONSI based on a draft EA. Section 11-200.1-20 describes the requirements for public review and response to comments for a draft EA. Section 11-200.1-21 describes the contents of a final EA. Section 11-200.1-22 describes the determination to issue an EISPN or FONSI and the FONSI content requirements.

§ 11-200.1-18 Preparation and Contents of a Draft Environmental Assessment

This section was formerly section 11-200-10 of the 1996 Rules, which addressed the contents of both a draft and final EA. The provisions related to the contents of a draft EA are retained here, but in line with the effort of the Proposed Rules to order the environmental review steps chronologically, the provisions related to the contents of a final EA were moved into a separate section in this subchapter, section 11-200.1-21.

The revised rule sources language from former section 11-200-9 of the 1996 Rules Version 0.3 proposed definitions for “project” and “program”, and this section describes how the distinction between a project and program influences the style of the document and the breadth and specificity of analysis and information contained therein.

Subsection (b) is a modification of the former section 11-200-19 of the 1996 Rules applying the style guidelines for an EIS to an EA. It mirrors the language included in the proposed 11-200.1-24 for the contents of a draft EIS, and provides that the scope and specificity within an EA will be commensurate with the scope of the action and the degree of specificity to which impacts are discernible at the time of preparation. Because a final EA is a draft EA revised to incorporate responses to comments, this section also applies to the style, breadth and specificity of analysis and information contained in a final EA.

This section clarifies that a programmatic EA may omit issues that are not ripe for discussion on a narrower scale. In the case of such an omission, a subsequent project may require its own chapter 343, HRS determination. Subchapter 7 of the Proposed Rules assists with understanding this situation.

Because most environmental review focuses on site-specific and discrete projects, the revised rule distinguishes between the level of detail and style of assessment for programs, which may be more broad and conceptual in nature, and that for projects, which are site-specific and discrete. By providing language on the level of detail and style of assessment for different types of actions, the rules give direction regarding how to address projects or programs at risk of segmentation and acknowledges the tension between the requirement to conduct environmental review at the earliest practicable time with the desire for project specificity. This paragraph mirrors the proposed paragraph in section 11-200.1-24 regarding the contents of a draft EIS.

The revised rule also focuses on analyzing instead of summarizing impacts. The use of the word “analyze” should not be understood to mean a lengthy discussion. It means that the impact discussion section should identify an impact and provide enough information to support a conclusion. In some cases, summaries tend to be assertions of impact and the degree of significance without presenting a supporting argument.

This section also requires applicants to identify which approval, when combined with a trigger, necessitated chapter 343, HRS environmental review.

This section also requires an indication of when individuals, organizations, or agencies were “consulted with” but had “no comment” if those persons or agencies are included as “consulted” entities in the draft EA. “No comment” can occur in at least two instances. First, when a person or agency responds to a written request for comments that it has “no comment”, and second, when a proponent provides information but does not solicit feedback. The second is not true consultation, because it is not reciprocal communication. This provision was added however, in response to concerns by individuals and organizations that they were listed in EAs as having been “consulted with” when they merely attended a public informational meeting where they received information from the action proponent, but were not invited to share feedback on the action. The proposed rules clarify that if the proponent desires to include attendees at informational meetings as those “consulted with” then it should be indicated whether those individuals or organizations gave “no comment”. This also protects individuals and organizations who wish to gather more information through an informational session but who would not be prepared to also provide informed feedback at such a preliminary session from being listed as a “consulted” entity who spoke with the proponent on behalf of oneself, community, or interest group. This section further recognizes that responses to pre-consultation comments are not required by HRS Chapter 343 or these rules to be in a draft EA. Rather, the focus of the rules is that all written comments and written responses must be reproduced in the final EA. If, however, written comments are received during pre-consultation and the applicant or agency provides a written response, the written comments and responses must be reproduced in the draft EA.

Lastly, this section incorporates language from former sections 11-200-10(8) and -10(9) requiring a draft EA to include specific agency or approving agency findings in the draft EA supporting agency determinations, including a FONSI.

§ 11-200.1-19 Notice of Determination for Draft Environmental Assessments

This section was formerly section 11-200-11.1 of the 1996 Rules. It aligns the EA process with changes to chapter 343, HRS that enable applicants to prepare their own EAs, as opposed to agencies preparing EAs on behalf of applicants. It separates language from the 1996 Rules into subsections to increase clarity.

Notably, this section simplifies the submittal requirement to one copy of the notice of determination and one copy of the final EA, which may be submitted electronically. This section also incorporates the filing requirements set forth in subchapter 4, and clarifies that approving agencies have a responsibility to send their determination to the applicant directly, but not necessarily via postal mail (electronic distribution is also acceptable).

The rule further clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its environmental review must be provided in the document. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be able to answer questions regarding the action or refer to someone within the agency or applicant's organization who can provide answers.

§ 11-200.1-20 Public Review and Response Requirements for Draft Environmental Assessments

This section was formerly section 11-200-9.1 of the 1996 Rules. If an agency does not anticipate a FONSI, then it will likely move to or authorize an applicant to directly move to prepare an EIS. This determination requires the approving agency to use its judgment and expertise. In some cases, although an agency may anticipate a FONSI, the FONSI may not be issued until an EA is completed.

The revised rule reflects the practice that the applicant, rather than the approving agency, prepares the EA.

This rule further acknowledges that the public review period may differ from the standard thirty (30) days provided under chapter 343, HRS and these rules for certain actions by statute. For example, the development or expansion of forensic facilities of the department of health or in-state correctional facilities have 60-day comment periods for draft EAs (and EISs), per sections 334-2.7 and 353-16.35, HRS, respectively.

The Council found that the requirement to send a response to every individual person commenting on an environmental review document can be extremely burdensome for agencies and applicants, and was not justified by any real benefit to interested stakeholders and the public that could not be satisfied by notifying the commenter via publication of the final EA.

The revised rule allows agencies and applicants to respond to issues raised by comments received on the draft EA within the final EA and deletes the former requirement to send individual responses directly to each commenter. This is intended to modernize and simplify the environmental review process. Commenters must still be identified in the response within the EA. The widespread availability of electronic documents to commenters and interested stakeholders relieves the necessity of sending individual written responses but still ensures that commenters receive notice (through the publication of the draft and final EAs) that their comment has been received, considered, and responded to. These changes reduce the burden on proposing agencies and applicants in responding to voluminous and nearly identical comments individually. It also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately, particularly with the increasing number of form letters and petitions used in this process.

The language proposed in this rule is drawn from the United States Council on Environmental Quality's (CEQ) "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations", #29a and aligns with NEPA practice, which allows grouping of identical or similar comments and providing one response that covers the issues raised in identical or similar comments. Because individual responses would no longer be sent, the requirement for the OEQC to receive a copy of the responses to comments is no longer relevant and has been deleted.

This section also incorporates language from the comment response requirements for EISs in section 11-200.1-26 providing guidance on how to discern substantive from non-substantive comments, and the level of detail a proposing agency or applicant should include at a minimum in responses.

This section is also modified to reflect that applicants prepare their own documents. Accordingly, the timely preparation of an EA or EIS by the approving agency is no longer applicable and is deleted.

Lastly, the Proposed Rules update references to filing and publication of addenda to a draft EA and public review of draft environmental assessments.

§11-200.1-21 Contents of a Final Environmental Assessment

This section is taken from the former section 11-200-10 of the 1996 Rules and lists the specific content requirements for a final EA. Changes to this section focus on analyzing instead of summarizing impacts. The rule also clarifies that the use of the word "analysis" should not be understood to mean a lengthy discussion. It means that the impact discussion section should identify an impact and provide a discussion detailed enough to support a conclusion. Summaries, in some cases, tend to be assertions of impact and the degree of significance without presenting a supporting argument or evidence. This rule also explicitly requires agencies to identify for applicants which discretionary permit necessitates environmental review under chapter 343, HRS.

§ 11-200.1-22 Notice of Determination for Final Environmental Assessments

Formerly section 11-200-11.2 of the 1996 Rules, this section sources language from section 11-200-9(b)(8) of the 1996 Rules. The revised rule aligns the process with Act 172 (2012), Direct-to-EIS, which requires the applicant to prepare documents instead of the approving agency. It also updates reference to subchapter 9, which encompasses the process and requirements for preparation of an environmental assessment previously included in sections 11-200-9(a) and 11-200-9(b) of the 1996 Rules.

The revised rule simplifies the submittal requirement to one copy of the notice of determination and one copy of the final EA, which may be submitted to the OEQC electronically. The specific filing and publication requirements are set forth in subchapter 4.

The rule clarifies that approving agencies have a responsibility to send their determination to the applicant directly, but not necessarily via postal mail (electronic distribution is sufficient). For applicant actions, the rule also explicitly requires the agency to issue its determination within thirty (30) days of receiving the final EA.

The revised rule adds language regarding the approving agency for the case of applicants because the accepting authority is applicable only for EISs and, in the case of applicant EISs, the accepting authority and approving agency are the same.

The revisions modernize the requirements to include email as a requirement for contact information. Most written communication today is done by email so providing that is just as important as a physical mail address.

The rule clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its environmental review must be provided. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be able to answer questions regarding the action or refer to someone within the agency or applicant's organization who can provide answers.

The revised rule further creates a standard set of content requirements for an EISPN regardless of whether the EISPN is a result of a final EA or a direct-to-EIS determination.

Subchapter 10 Preparation of Environmental Impact Statements

Subchapter 10 (Preparation of Environmental Impact Statements) creates a distinct subchapter that addresses EISs. This subchapter provides direction to an agency when it has decided that an EIS is the appropriate level of review, whether by the direct-to-EIS pathway as addressed in subchapter 7 (Determination of Significance) or by the issuance of an EISPN after a final EA, as addressed in subchapter 9 (Preparation of Environmental Assessments). The sections in this subchapter are ordered chronologically to show the process that will be followed, starting with the publication of an EISPN, and ending with the matter of supplemental EISs.

Section 11-200.1-23 describes the contents of an EISPN, as well as the requirement of full and complete consultation, the EIS public scoping meeting, and the comment period following the publication of an EISPN. Section 11-200.1-24 describes the content requirements for a draft EIS, the scope of analysis and level of detail required in a draft EIS, and the response requirements to comments received during the 30-day scoping period. Section 11-200.1-25 describes the public review requirements for a draft EIS. Section 11-200.1-26 sets forth the requirements for responding to comments received on a draft EIS.

Section 11-200.1-27 describes the content requirements for a final EIS. Section 11-200.1-28 specifies the criteria for deeming a final EIS an acceptable document and outlines the steps following an acceptance or non-acceptance determination. Section 11-200.1-29 describes how an applicant may appeal an agency determination of non-acceptance to the Council. Section 11-200.1-30 addresses circumstances when a supplemental EIS may be required after acceptance of an EIS.

§ 11-200.1-23 Consultation Prior to Filing a Draft Environmental Impact Statement

This section was formerly section 11-200-15 in the 1996 Rules and governs the content requirements for an EISPN. As discussed in the rationale for section 11-200.1-10, this section retains the 1996 Rules requirement for the identification of all permits and approvals expected for the project, and adds for applicants the identification of which specific discretionary approval that, combined with a trigger from section 343-5, HRS, necessitated the applicant to undergo environmental review. This is a requirement in preparation of an EA and included here as a content requirement of an EISPN to ensure that the public and decision makers are provided this information because an agency may begin with, or authorize an applicant to begin with, an EISPN without preparation of an EA where that information would have been disclosed. The content requirements for the EISPN are standard regardless of how one arrives at conducting an EIS (e.g., resulting from an EA or directly preparing an EIS).

The revised rule further clarifies that the name and contact information of a specific individual with authority and knowledge to answer questions regarding the proposed action and its environmental review must be provided. A generic phone line or email address of the proposing agency or applicant without an individual identified will not satisfy this requirement. The person should be able to answer questions regarding the action or refer to someone within the agency or applicant's organization who can provide answers.

The revised rule removes the requirement for an individual to become a consulted party to engage directly in providing and receiving public documents and determinations related to the proposed action. All documents and determinations are now published online and available through the OEQC's website: http://oeqc2.doh.hawaii.gov/EA_EIS_Library/

Most notably, this section makes the public scoping meeting a requirement and emphasizes that the meeting is about what the scope of the draft EIS should be. Proposing agencies and applicants acting within the spirit of chapter 343, HRS should engage meaningfully with individuals, organizations, and agencies early and often throughout the environmental review process.

The revised rule also shifts the focus to written comments submitted during the EISPN comment period and public scoping meeting and removes the requirement for the EIS preparer to transcribe individual oral comments. Instead, the revised rule provides that oral comments must be recorded, and a summary of the oral comments must be included as a separate section in the draft EIS. Written comments require responses to the comments in the draft EIS pursuant to section 11-200.1-24.

While the 1996 Rules allowed for a public scoping meeting, it was not required. The Council received comments both in favor of and opposed to requiring a public scoping meeting. The changes to the oral and written comments treatment were made after extensive consultation with interested stakeholders on this provision and as an effort to balance this new requirement for public scoping meetings and increased consultation, with the burden on the agencies and applicants preparing statements.

This section also allows the approving agency or accepting authority, with good cause, to extend the comment period on its own initiative or at the request of another party.

The draft EIS content requirements that were formerly in this section were relocated to section 11-200.1-24.

§ 11-200.1-24 Content Requirements; Draft Environmental Impact Statement

This section was formerly section 11-200-17 in the 1996 Rules and sets forth the content requirements for draft EISs. Other language in this section is sourced from sections 11-200-16 and 11-200-19 of the 1996 Rules.

Many edits in this section were made to bring it in line with NEPA language. This rule also provides that the scope and specificity within an EIS will be commensurate with the scope of the action and the degree of specificity to which impacts are discernible at the time of preparation.

New concepts are introduced in the Proposed Rules:

Project Specific and Programmatic EISs: Version 0.3 proposed definitions for “project” and “program”, and this section describes how the distinction between a project and program influences the style of the document and the breadth and specificity of analysis and information contained therein.

This section clarifies that the programmatic EIS may omit issues that are not ripe for discussion on a narrower, project-specific level. In the case of such an omission, a subsequent project may require its own chapter 343, HRS determination or environmental review. Proposed subchapter 7A assists with understanding this situation.

The revised rule also distinguishes between the level of detail and style of assessment for programs, which may be more broad and conceptual in nature and that for projects, which are site-specific and discrete. Most environmental review focuses on site-specific and discrete projects. By providing language on the level of detail and style of assessment for different types of actions, the rules give direction regarding how to address projects or programs at risk of being viewed as segmented and acknowledges the trade-off between earliest practicable time to begin environmental review and project specificity. This paragraph mirrors the proposed paragraph in section 11-200.1-18 regarding contents of a draft EA.

Response to Comments: This section emphasizes that the comments are written comments that are submitted during the consultation period. Revised language in this section aligns with language in section 11-200.1-26 that changes the requirement to respond to voluminous and nearly identical comments individually. It also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately. It further clarifies that responses shall be made and included within the draft EIS itself. Responses no longer need to be sent separately to each commenter.

The rule requires that when batching comments and responses, the preparer must include the names of the individual commenters who provided comments on that topic and who have been grouped, so that those commenters can see whether their comment was addressed and what the response is.

The general summary of oral comments from the public scoping meeting does not need to be an exhaustive or verbatim transcript, but does need to be a written summary included in the draft EIS. It is intended to capture generally the comments made at the scoping meeting. Oral comments are not required to be responded to directly in the EIS, but must be taken into consideration in identifying likely effects. A court reporter or transcriber is not required at the public scoping meeting.

The revised rule also requires that a representative sample of the handouts prepared for and distributed at any public scoping meeting, including the agenda, must be included in the draft EIS. Handouts not related to the action need not be included. For example, general promotional materials for the applicant need not be included, but a fact sheet outlining the proposed action should be included.

The revised rule also distinguishes between a consultation in which an agency, citizen group, or individual provides comments to the proposing agency or applicant regarding the action and a consultation in which the proposing agency or applicant only provides information about the action to the agency, citizen group, or individual. The revised rule includes requirements for when individuals, organizations, or agencies were “consulted with” but had “no comment”. This can occur in at least two instances. First, when an agency responds to a written request for comments that it has “no comment”, and second, when a proponent provides information but does not solicit feedback. The second is not true consultation, because it is not reciprocal communication. This provision was added however, in response to the concerns by individuals and organizations whose names were listed in EISs as having been “consulted with” when they merely attended a public informational meeting and received information from the action proponent, but were not invited to share feedback on the action. The Proposed Rules clarify that if the proponent desires to include attendees at informational meetings as those “consulted with” then it should indicate whether those individuals or organizations gave “no comment”. This also protects individuals and organizations who wish to gather more information through an informational session but are not be prepared to provide informed feedback at such a preliminary session from being listed as a “consulted” entity who spoke with the proponent on behalf of oneself, community, or interest group.

The rule makes explicit that only one representative copy of the agency consultation letter is required, similar to requiring only one reproduction of identical comments, such as form letters.

Public Scoping Meeting Location: The Council discussed where public scoping meetings would be required to be held. The Council sought to balance community input and engagement with reducing the burden on proposing agencies and applicants. Different options were considered, including requiring a public scoping meeting in the “county”, or “island” or on the “islands” where the action will have the greatest effect. The Council noted the importance of holding the scoping meeting closest to where there will be an effect and should be held on the island of those likely impacts. Therefore, the word “county” was inappropriate because public scoping meetings for actions proposed in Maui County could be held on an island different than that of the action.

The Council also considered but left for future guidance documents that accessibility must be considered when planning the scoping meeting. For example, an action that will have an impact on individuals in the Hilo area of the Island of Hawaii should hold a meeting in the vicinity of Hilo, not Kona. The Council also considered that there may be instances where an action could adversely affect multiple communities on more than one island and accounts for this by pluralizing “island” in parenthesis: island(s).

Other Changes:

The revised rule also clarifies that the list of relevant documents means documents other than chapter 343, HRS, environmental review documents. The documents may be used to identify potential segmentation or cumulative impacts of a proposed action, or for other purposes in preparation of the EIS.

The revised rule also clarifies that not all alternatives to the action must be considered--only those that are considered by the proposing agency or applicant to be “reasonable” need to be rigorously explored and objectively evaluated. This qualification is drawn from NEPA’s 40 CFR 1502.14(a): “Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated”. The revised rule also requires discussion of the reasons for omitting detailed study of alternatives.

The revised rule also updates the subsection listing laws containing environmental goals and guidelines that the draft EIS must address adverse effects on, as applicable. In considering which environmental laws and policies to address, include the ones listed in paragraph (o) as applicable and any laws relevant to the significance criteria or criterion under section 11-200.1-13 that required preparation of the EIS.

Subsections (i) and (j) explicitly include “cultural” resources as part of the impacts to be analyzed in line with Act 50 (2000).

§ 11-200.1-25 Public Review Requirements for Draft Environmental Impact Statements

This section was formerly section 11-200-22, HAR (1996). The rule encourages open and early consultation with interested stakeholders, and for an applicant EIS, that the approving authority and accepting agency are the same. This section also ties back to section 11-200.1-1, which provides the spirit in which consultation should be conducted to align with the purpose of the chapter.

The rule provides that the standard comment period for a draft EIS is forty-five (45) days, and acknowledges that the public review period may be something other than forty-five (45) days for certain actions by statute. For example, the development or expansion of forensic facilities of the department of health or in-state correctional facilities have 60-day comment periods for draft EISs (and EAs), per sections 334-2.7 and 353-16.35, HRS, respectively.

§ 11-200.1-26 Comment Response Requirements for Draft Environmental Impact Statements

This rule was formerly section 11-200-22 in the 1996 Rules, which has been divided into two sections including this section and the preceding section 11-200.1-25. This section more specifically addresses response requirements for written comments received during the 45-day public review and comment period.

The comment response requirements for an EIS mirror those for an EA, found in subchapter 9. This section similarly explicitly allows for batching comments, akin to what is allowed under NEPA, and in doing so, changes the requirements for responding to voluminous and nearly identical comments individually. The rule also focuses attention on the content of the comments and the issues raised, rather than on responding to each individual commenter separately. If the batching option is used, the individuals, agencies, and organizations who commented on the specific topic to which the response is directed must be identified as part of the response. This rule clarifies that responses to substantive comments must be made and included as part of the draft EIS. The revised language gives guidance regarding which factors are to be considered when determining whether a comment is substantive, and requires that comments deemed non-substantive and to which a response was not given must be clearly indicated (§ 11-200.1-27).

§ 11-200.1-27 Content Requirements; Final Environmental Impact Statement

Formerly section 11-200-18 of the 1996 Rules, this section sets forth the content requirements for a final EIS. The revised rule incorporates the content requirements for a draft EIS set forth in section 11-200.1-24 and requires that the reproduction and response to comments on the draft EIS within the final EIS conform with the requirements set forth in section 11-200.1-26.

In subsection (a), this section amends the requirement for a final EIS to discuss all “relevant and feasible consequences” to “all reasonably foreseeable consequences”. The Council proposed this revision because the phrase “reasonably foreseeable” is a phrase line from NEPA. Therefore, there is more case law history and federal guidance to assist in its interpretation and application to various circumstances.

Like section 11-200.1-24 for draft EISs, this section lists the specific content requirements for the final EIS. This section also distinguishes between a consultation in which an agency, citizen group, or individual provides comments to the proposing agency or applicant regarding the action and a consultation in which the proposing agency or applicant only provides information about the action to the agency, citizen group, or individual. It requires an indication of when an agency, citizen group, or individual was “consulted with” but had “no comment” if that agency, citizen group, or individual is included as a “consulted” entity in the draft EIS. “No comment” can occur in at least two instances.

First, when a person or agency responds to a written request for comments that it has “no comment”, and second, when a proponent provides information but does not solicit feedback. The second is not true consultation, because it is not reciprocal communication. This provision was added however, in response to concerns by individuals and organizations whose names were listed in EISs as having been “consulted with” when they merely attended a public informational meeting where they received information from the action proponent, but were not invited to share feedback on the action. The Proposed Rules clarify that if the proponent desires to include attendees at informational meetings as those “consulted with” then it should indicate whether those individuals or organizations gave “no comment”. This also protects individuals and organizations who wish to gather more information through an informational session but are not be prepared to also provide informed feedback at such a preliminary session from being listed as a “consulted” entity who spoke with the proponent on behalf of oneself, community, or interest group. The section also specifies that a summary of the oral comments made at any EIS public scoping meeting held pursuant to section 11-200.1-23 must be included. This section adds additional requirements specific to the preparation of the final EIS, including responses to comments received on the draft EIS and a list of persons or agencies consulted in preparing the final EIS.

§ 11-200.1-28 Acceptability

This section is formerly section 11-200-23, HAR (1996). The Proposed Rules introduce several minor clarifying amendments, including: (1) breaking up long paragraphs into subsections; (2) clarifying that the section applies to final EISs; (3) clarifying that the acceptability of the final EIS includes a review of acceptability of the full environmental review process--from the proposal of the action to publication of the EIS; (4) clarifying that an acceptability determination requires the approving agency or accepting authority to assess whether the proposing agency or applicant classified comments as “substantive” and have included satisfactory responses to these comments in a manner commensurate with the level of detail included in the substantive comment; and (5) clarifying that comments must have been satisfactorily incorporated into the final EIS. “Satisfactorily” in this section refers to the satisfaction of the approving agency or accepting authority that the requirements have been met. The clarifications regarding the designation of “substantive” comments and the responses thereto are intended to address concerns that proposing agencies or applicants may intentionally or unintentionally disregard substantive comments as non-substantive. These clarifications draw the approving agency or accepting authority’s attention to the requirement that all components of the EIS process must be satisfactory to the approving agency or accepting authority, including the proposing agency or applicant’s exercise of discretion in designating comments as substantive or non-substantive. In subsection (b)(3), the revised rule also adds in that approving agencies and accepting authorities should ensure that comments have been “appropriately incorporated into the final EIS”. The addition of the word “appropriately” is intended as a recognition that not all comments will be incorporated or necessitate a change in the body of the final EIS, and that some comments, such as form letters or petitions, may not need to be appended if there is a representative sample included pursuant to the comment response provisions of this subchapter.

The revised rule also provides in subsection (c) that for actions proposed by an agency, the OEQC may submit a recommendation regarding acceptability or non-acceptability to the accepting authority and proposing agency. The Proposed Rules do not place a deadline on the OEQC's recommendation because chapter 343, HRS does not impose a deadline on the determination of acceptability of agency actions. The Council took into consideration that the OEQC should endeavor to provide a recommendation as early as practicable, but that requiring a deadline may prevent the OEQC from providing a recommendation if an accepting authority takes longer than usual to make a determination.

Subsection (e) includes a clarification that the accepting authority for an applicant action is the approving agency. Subsection (e) also clarifies that the 30-day period for an approving agency to determine the acceptability of an EIS begins with the submission of the final EIS to the approving agency or accepting authority, rather than publication of the final EIS in the bulletin. Further, subsection (e) clarifies that the 30-day acceptance determination period may be extended at the request of the applicant for an additional fifteen (15) days.

Other minor changes were made in accordance with global edits throughout the Proposed Rules, such as updating section references, and replacing the term "statement" with EIS and clarifying that "state or county lands or funds" can include "state or county lands", "state or county funds" or both state and county lands and state and county funds.

Finally, minor changes are made to clarify the process for withdrawing an EIS.

§ 11-200.1-29 Appeals to the Council

This was formerly section 11-200-24, HAR (1996). The proposed amendments to this section are intended to clarify the existing language, as well as to specify the process by which the Council hears the appeal.

The Proposed Rules clarify that an appeal may be filed by an applicant with the Council after the non-acceptance determination by the approving agency under the acceptability criteria in subchapter 10, "Preparation of Environmental Impact Statements".

The Proposed Rules clarify that upon receipt of an appeal, the Council chairperson shall include the appeal on the agenda of the next council meeting. This connects the receipt of the notice of the appeal under section 343-5(e), HRS, with the timing of the next Council meeting.

Previous versions of the Proposed Rules included provisions that an applicant may also seek judicial review of the non-acceptance pursuant to chapter 91, HRS and that pursuing an appeal to the Council does not abrogate the applicant's right under section 343-7(c), HRS to bring a judicial action. The Council omitted these proposed changes from Version 0.3 and the currently Proposed Rules because it received feedback that such language was unnecessary and may be outside the scope of the rules.

The Council also considered but ultimately omitted in the Proposed Rules including a provision that an entity other than an applicant could appeal the non-acceptance of an EIS to the Council. The Council also considered increasing the 30-day time limit in which the Council must make a decision on an applicant's appeal. This would address the need for a realistic timeframe in which the Council could prepare for and consider such an appeal, particularly given that the Council meets only monthly. The Council ultimately omitted the change and instead revised the rule to state that the Council would make a determination within the statutory prescribed period of time. This allows for the Proposed Rules to be consistent with the statute, but also for flexibility in the future should the statutorily prescribed time period be changed.

§ 11-200.1-30 Supplemental Environmental Impact Statements

All language in this section comes from sections 11-200-26 to 11-200-29, HAR (1996) and synthesizes those sections into a single section. Minor stylistic changes were made, such as replacing “statement” with EIS. Subsection (a) was formerly section 11-200-26, HAR (1996). Subsection (b) was formally section 11-200-27, HAR (1996). Subsection (c) was formerly section 11-200-28, HAR (1996). Subsection (d) was formerly 11-200-29, HAR (1996).

Version 0.1 considered changes to the sections dealing with supplemental EISs that would have: (1) explicitly added “new information” as a factor to consider when weighing the necessity of a supplemental EIS; (2) explicitly provided for which sources of new information should be considered when determining the necessity of a supplemental EIS; and (3) established a five-year review requirement of accepted EISs for actions that had not yet substantially commenced. Version 0.1 also organized the information in the currently proposed subparagraph (a) of the Proposed Rules (originally section 11-200-26, HAR (1996)) into subparts.

The Council received multiple comments both in support of and raising concern about explicitly establishing “new information” as a factor for requiring preparation of a Supplemental EIS. Many practitioners expressed that this requirement was already clear in case law, particularly through *Unite Here! Local 5 v. City and County of Honolulu*, 231 P.3d 423, 430 (Haw. 2010), also known as the Turtle Bay case. Altering this section, they provided, could create confusion where the Supreme Court of Hawaii has already established precedent.

Similarly, the Council received numerous comments both in support of and raising concerns regarding the five-year review period. There was some confusion over whether the proposal in Version 0.1 established an “expiration date”. It did not. The intention was to provide a checkpoint for review with the exception that the review was only necessary if an action had not yet substantially commenced. The 1996 Rules provide that a supplemental EIS must be prepared in certain circumstances, but do not establish the time period or requirement for making that determination. The five-year review was intended to address that gap. The language of “substantial commencement”, intended to ensure that actions that were already well underway or completed were not subject to the uncertainty of a supplemental EIS review, also posed some interpretation challenges.

A definition for “substantial commencement” was also considered in conjunction with this section and the section on emergency actions. It was deleted in Version 0.3.

In support of the five-year review, some commenters provided that a clear checkpoint--which the 1996 Rules lack--is necessary to create certainty. In the Turtle Bay case, a review for the necessity of a supplemental EIS took place because the developer sought a discretionary permit necessary to proceed with the completion of the proposed action. If only ministerial approvals were necessary for completion, then under the 1996 Rules the necessity of a supplemental EIS may not have been considered.

Taking those concerns into account, the Proposed Rules substantially retain the original language from the 1996 Rules and simply combine the sections into one section. The proposed requirement for five-year review has been removed. In its place, the Proposed Rules propose mandating a process (i.e., the “green sheet”) for agencies to follow when considering issuing permits for actions with existing EAs and EISs. For further details on that process, see the “Green Sheet” section of this document.

Subchapter 11 National Environmental Policy Act

Subchapter 11 (National Environmental Policy Act) creates a distinct subchapter to describe how to conduct environmental review for chapter 343, HRS, when federal National Environmental Policy Act (NEPA) environmental review is also applicable. Although this subchapter contains only one section, creating a new subchapter is in line with creating a new structure for chapter 11-200.1, HAR providing a clear outline of the contents of the Chapter through the subchapter headings.

§ 11-200.1-31 National Environmental Policy Act Actions: Applicability to Chapter 343, HRS

This section was formerly section 11-200-25, HAR (1996). The 1996 Rules allowed cooperation between federal and state agencies on actions requiring both NEPA and HEPA review. The Proposed Rules clarify that where an action triggers both NEPA and HEPA review, the NEPA document may be used to satisfy the HEPA requirements, so long as it meets the required HEPA criteria.

In adopting the revised language in this section, the Council emphasizes that while a particular level of review may be required under NEPA, the same level of review may not be required under HEPA. For example, federal categorical exclusions (the federal equivalent of a state exemption) do not automatically result in exemptions under chapter 343, HRS. Conversely, the federal government may issue a FONSI for its purposes, but a state or county agency may require an EA or EIS be done for its purposes, or issue an exemption based on the federal FONSI. State and county agencies may do so, but must still make a determination, through their own judgment and experience, that the action is exempt, requires an EA, or may proceed directly to preparing an EIS, under chapter 343, HRS and the HEPA-specific content requirements, before determining whether the NEPA document satisfies the required level of review under HEPA.

To that end, subchapter 7 and the new section 11-200.1-12 (the “green sheet”) proposed by these rules provides a tool to guide agencies on how to prepare the evaluation of whether or not the NEPA document satisfies the requirements of chapter 343, HRS.

Some of the language in this section was inspired by and based on similar language from Massachusetts and Washington, providing that federally-prepared EISs are sufficient so long as they meet the state’s statutory requirements. The goal is to allow a federal EIS to meet the chapter 343, HRS requirements provided that it addresses chapter 343, HRS content requirements. In this case, state and county agencies can provide the information to the federal preparer for inclusion in its document rather than the state or county agency preparing a second document.

This section also addresses which agency is responsible (federal, state or county) for preparing the document, as well as delegation of that responsibility from the federal agency to a state or county agency.

Furthermore, this section addresses, for example, situations where a federal agency's regulations may require a public scoping meeting prior to publishing a Notice of Intent to prepare an environmental impact statement and under chapter 343, HRS, the same action would also require a public scoping after the publication of an EISPN. This clause reduces the burden on the proposing agency or applicant to conduct two public scoping meetings.

The rule also clarifies that in the case of joint documents, the preparation of any supplemental documentation would be due to federal requirements and that HEPA supplemental requirements would not apply. The rule further clarifies who the accepting authority is for federal, state, and county actions.

Lastly, the rule explicitly states that any acceptance pursuant to this section satisfies chapter 343, HRS and that no other EIS shall be required for the proposed action. If the NEPA process requires supplemental review, the responsible federal entity's supplemental review requirements would apply instead of requirements under chapter 343, HRS.

Subchapter 12 Retroactivity and Severability

Subchapter 12 (Retroactivity and Severability) creates a distinct subchapter addressing the retroactivity of the Proposed Rules when enacted and the severability of the Proposed Rules.

Section 11-200.1-32 describes when chapter 11-200.1, HAR takes effect. Section 11-200.1-33 includes the severability clause.

§ 11-200.1-32 Retroactivity

This is an entirely new section on when the Proposed Rules take effect and how the Proposed Rules apply to actions that have already completed the environmental review process or are undergoing it at the time the Proposed Rules take effect. This section was added in response to public comments concerning actions currently pending. This provision ensures that an action is not prevented from proceeding under the 1996 Rules when it otherwise would but is delayed due to a judicial proceeding or other reasons.

This section also provides a period of time for agencies to update their existing exemption lists from “classes” to “types” of action, to designate those activities that would fall under “Part 1” of the list, and to reassign exemptions to the appropriate general types.

As used in this section, publication by OEQC requires that the document was submitted and met all requirements for publication.

§ 11-200.1-33 Severability

This section was formerly section 11-200-30 in the 1996 Rules and provides that each provision in the Proposed Rules is severable and that the invalidity of any provision in this chapter does not affect the validity of the others. No amendments are proposed to this section.

Note

The historical note will be revised following public hearing on the Proposed Rules and finalization for enacting the final Proposed Rules into law.